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No Right to Lie, Cheat, or Steal: Public Good v. Private Order

Madeleine M. Plasencia

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MADELEINE M. PLASENCIA*

Fraud is deceit. And the essence of fraud is, "I create trust in you, and then I betray that trust, and get you to give me something of value." And as a result, there's no more effective acid against trust than

* B.A. Cornell University; J.D. University of Pennsylvania. Visiting Scholar, University of Miami School of Law. Thanks to University of Miami School of Law Dean Patricia White for supporting my scholarship and Vice Dean Patrick Gudridge for thoughtful comments on an earlier draft. Thanks are due also to Barbara Atwood; Jonathan Bates, Esq. of Kinser & Bates, LLP Family Lawyers (Dallas) (trial counsel for Caroline Feherty); Brian H. Bix; Stephen M. Feldman; Harry G. Frankfurt; Dennis Klimchuk; Sophie Mills; James W. Nickel; Carolina Varga Dinicu (stagename: Morocco aka "Rocky" (New York City)). Thanks also to the superb research reference support of Robin C. Schard and excellent editorial assistance and input from the *University of Miami Law Review* Editorial Board. To my spouse, Elizabeth M. Iglesias, I am profoundly grateful for numerous discussions and invaluable edits to the final draft. With respect to errors, I hope there are none.

fraud, especially fraud by top elites, and that's what we have.[1]

William K. Black, former bank regulator and author of
The Best Way to Rob a Bank Is to Own One

I. INTRODUCTION

At the turn of the current millennium, America appears to be struggling under the burden of an increasingly pervasive tolerance for lies and deception in our private and public affairs.[2] Even at a surface level, deceptive actions, whether open and notorious in their costs and consequences or otherwise buried in the proceedings of failed lawsuits, tear at the understandings and expectations that ground both private relations and public order on the bonds of social trust and correct action. Evidence that the American invasion of Iraq in 2003 was grounded on a carefully orchestrated scheme to manipulate public perceptions into falsely believing that Iraq had weapons of mass destruction has produced no remedy for the costs and consequences of this profound breach of trust and error of judgment.[3] Though lesser than the costs and conse-

1. *See* Bill Moyers, *Bill Moyers Journal: William K. Black on the Bailout*, PBS (April 3, 2010), http://www.pbs.org/moyers/journal/04232010/watch.html (interview with former bank regulator and author of *The Best Way to Rob a Bank Is to Own One*, William K. Black); *see, e.g.*, PLUNDER: THE CRIME OF OUR TIME (Globalvision 2009) (documentary film exploring the financial crisis links to the housing market lending crisis); INSIDE JOB (Sony Pictures Classics 2010) (documentary film recounting broad range of fraud and deceit at every level leading into the 2008 financial crisis); *see also* A NEW WAY FORWARD – RESTORE THE ECONOMY IN THE PUBLIC'S INTEREST, http://www.anewwayforward.org/ (last visited on Sept. 10, 2013) (described as an online grassroots campaign and reform thinking group for structural reform of the economy).

2. *See, e.g.*, ALEXANDRA KITTY, OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM 289 (Jason Louv ed., 2005) (criticizing journalists and media owners for focusing on profit margins and branding trends over truth and transparency and documenting comparative rates of resultant mistaken beliefs by viewers of the various television networks). For example, "33% of Fox viewers thought U.S. soldiers found [weapons of mass destruction] in Iraq, while 20% of CNN and 11% of NPR/PBS viewers/listeners did. 35% of Fox News viewers mistakenly believed that the U.S. war against Iraq had international support, while 5% of NPR/PBS consumers thought that." *Id.*; *see generally* AL FRANKEN, LIES (AND THE LYING LIARS WHO TELL THEM) (2003) (documenting lies by media pundits).

3. . . . In making the case for war, the Administration repeatedly presented intelligence as fact when in reality it was unsubstantiated, contradicted, or even non-existent. As a result, the American people were led to believe that the threat from Iraq was much greater than actually existed.

It is my belief that the Bush Administration was fixated on Iraq, and used the 9/11 attacks by al Qa'ida as justification for overthrowing Saddam Hussein. To accomplish this, top Administration officials made repeated statements that falsely linked Iraq and al Qa'ida as a single threat and insinuated that Iraq played a role in 9/11. Sadly, the Bush Administration led the nation into war under false pretenses.

There is no question we all relied on flawed intelligence. But, there is a fundamental difference between relying on incorrect intelligence and deliberately painting a picture to the American people that you know is not fully accurate.

Press Release, U.S. Senate Select Comm. on Intelligence Comm., Senate Intelligence Committee

quences of an unlawful invasion and occupation of a nation state, deceptive practices in other areas of social interaction have profoundly destructive consequences for the way we understand the relations through which we form families, transact business, and constitute ourselves as a civil—or not so civil—society. The character and content of these social relations are evidenced both by the transactions that actually transpire between specific parties who oftentimes end up in court and by the structure of rights and obligations through which the courts allocate blame, award remedies, or decline to do either.

In this Article, I want to push back against the problem of lies and deceit in our current social and political life and the apparent failure of our legal system to provide adequate remedies for the consequences of such lies. That deception appears to be an increasingly acceptable practice may not have been the intent underlying the U.S. Supreme Court's First Amendment jurisprudence, but it is nonetheless a consequence.[4] In this body of law, the social harms caused by falsely representing oneself to be a decorated war hero, falsely asserting one's company is socially responsible, or secretly coordinating with third parties to create the false appearance that one's attacks on a competitor reflect the independent judgment of uninterested parties are all discounted,[5] even as the protection afforded such deceptive utterances promotes the further pollution of our private relations and public discourse by what is aptly called "bullshit."[6]

Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), *available at* http://www.intelligence.senate.gov/press/record.cfm?id=298775 (statement of Chairman John D. (Jay) Rockefeller IV).

4. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (holding that the Stolen Valor Act—making it a crime for individuals to falsely claim they received military decorations—violated the First Amendment); Nike, Inc. v. Kasky, 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (defending the decision to dismiss a writ of certiorari as improvidently granted in a case blending false advertising, non-commercial speech and public debate on mistreatment of workers in Nike's foreign facilities); *see also* E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961) (holding that it is not a violation of the Sherman Act for multiple companies working together to enlist a public relations firm to produce third-party campaign to attack competitor via "deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information" (internal citations and brackets omitted)).

5. *See Alvarez*, 132 S. Ct. at 2549 (holding that the government's and decorated soldiers' interests in preserving the value of military awards does not justify regulating false speech); *Nike, Inc.*, 539 U.S. at 656 (Stevens, J., concurring) (explaining that Nike should be able to participate in discussion without fear of reprisal for its false statements made without malice); *E.R.R. Presidents Conference*, 365 U.S. at 140–41 (failing to discuss the adverse consequences of the "deception of the public [and] manufacture of bogus sources of reference").

6. HARRY G. FRANKFURT, ON BULLSHIT 5 (2005). I follow Frankfurt in using the word "bullshit" and not more polite synonyms such as humbug, balderdash, claptrap, hokum, drivel, buncombe, imposture, quackery, or the more contemporary locution *crap* because their meanings may not match, and worse, may confuse the discussion. *Id.* at 18.

A. *On Bullshitting and Lying*

In his brief, but punch-packing little book called *On Bullshit*, Harry G. Frankfurt uses a great example to get at what he believes to be the essence of bullshit—the thing that makes it different from lying—and the likely consequences of its pervasive circulation in a society. To do so, he borrows from a Longfellow verse:

> In the elder days of art
> Builders wrought with greatest care
> Each minute and unseen part,
> For the Gods are everywhere.[7]

This verse makes the point that artisans, builders, and craftsmen applied the highest standard to all of their work—even to parts that would remain forever unseen by others: "Although no one would notice if those features were not quite right, the craftsmen would be bothered by their consciences. So nothing was swept under the rug. Or, one might perhaps also say, there was no bullshit."[8] Bullshit bears a certain resemblance to the production of shoddy goods in that "bullshit itself is invariably produced in a careless or self-indulgent manner, that it is never finely crafted."[9] Like the shoddy craftsman, who relieves himself of the burden of meeting standards, the bullshitter relieves himself of the burden of discerning and communicating truth. Bullshit reflects a "lack of connection to a concern with truth—[an] indifference to how things really are."[10] So the bullshitter is a slob whose assertions make a mess of the truth. This is precisely the idea Frankfurt finds embedded in the word "shit." As he puts it, "[e]xcrement is not designed or crafted at all; it is merely emitted, or dumped. It may have a more or less coherent shape, or it may not, but it is in any case certainly not *wrought*."[11] Operating in a world where truth is distinguished from lies entails a great deal more effort. It requires thoughtful attention to detail.[12] It requires discipline and a steadfast commitment to pursue objectivity.[13] "It entails accepting standards and limitations that forbid the indulgence of impulse or whim," says Frankfurt.[14] While the shoddy craftsman excuses his sloppiness by choosing to believe that everyone cuts corners, the bullshitter excuses himself of culpability for any harm caused by being fast and loose with the truth insofar as he chooses to believe that everyone is

7. *Id.* at 19–20 (footnote omitted).
8. *Id.* at 20–21.
9. *Id.* at 21.
10. *Id.* at 33–34.
11. *Id.* at 21–22.
12. *See id.* at 22.
13. *Id.*
14. *Id.*

bullshitting. The truth is not relevant to the bullshitter because in his view, everyone bullshits.

And yet, there is a long and profoundly significant tradition in our legal jurisprudence, which repudiates deception by refusing to allow liars to profit from their own fraud and deceit. Frankfurt's argument touches the heart and soul of this tradition—or the bread and butter for the more gastronomically oriented among us—when he argues that "lying decisively undermines the cohesion of human society."[15] Reaching for a community of speakers on the subject, Frankfurt quotes passages from Immanuel Kant's *Lectures on Ethics* and *On a Supposed Right to Lie from Altruistic Motives*: "[W]ithout truth[,] social intercourse and conversation become valueless. . . . [A] lie always harms another; if not some particular man, still it harms mankind generally."[16] And this from Michel Montaigne's *Of Giving the Lie*: "Our intercourse being carried on solely by means of the word, he who falsifies that is a traitor to society."[17]And another tidbit from Montaigne's *Of Liars*: "Lying is an accursed vice. . . . If we did but recognize the horror and gravity of . . . [lying], we should punish it with flames more justly than other crimes."[18]

Given the importance of truth to a civilized society, it is worthwhile to examine the concepts that inform the legal repudiation of fraud and deception in order to excavate venerable understandings, which can help us push back against the forces of bullshit that in our time may otherwise succeed in making lies and deceit an ever more prevailing practice. In order to push back, we need to understand *how to understand* the consequences of lies and deception. This means reclaiming conceptual frameworks that help us more clearly see the injury that lies and deceit inflict on society. Seeing this injury is itself a challenge in part and precisely because a pervasive tolerance—a minimization—a conflation or reduction of lies and deceit to "mere bullshit" or "drama" tends to destroy our capacity to recognize the problem. It's all just bullshit, and everyone bullshits, or so the prevalence of bullshit among us might tempt us to believe.

In order to examine these issues, this Article looks at three cases at the intersection of contract and tort law. At a surface level, each case appears to concern a very different area of law. In Part II, I take up the case of *Moore v. Moore*.[19] This case involved a divorce disputing the

15. HARRY G. FRANKFURT, ON TRUTH 69 (2006).

16. *Id.* at 70 (citations omitted).

17. *Id.* (citations omitted).

18. *Id.* at 70–71 (citations omitted).

19. 383 S.W.3d 190 (Tex. App. 2012) *reh'g overruled* (Nov. 29, 2012), *review denied* (Apr.

validity of a prenuptial agreement under Texas state law, all the way up to the Texas Supreme Court.[20] The issue of how to deal with deception and fraud is organized around the trial court's initial interpretation of the requirement of voluntariness in a Texas statute establishing the conditions for prenuptial agreements to be valid under state law.[21] The Texas courts' treatment of the case provides an initial understanding of the injury caused by deception and fraud, as well as the current state of a debate as old as Aristotle. This debate concerns the remedies that ought to be available for fraud and deceit—in this instance, as understood and applied by Texas state courts, in the context of the interpersonal relations that the law of marriage and divorce seeks to mediate.

In Part III, I consider the case of *ABRY Partners V, L.P. v. F&W Acquisition LLC*.[22] This case turns our attention away from family relations to examine how fraud and deceit are handled in the context of a stock purchase agreement negotiated between two private equity firms.[23] *ABRY* was litigated before the Delaware Court of Chancery.[24] This case helps reveal the injury that fraud and deception inflict on society because of the way the Court of Chancery analyzed the relationship between public interest and private order when asked to enforce a contract that included fraudulent misrepresentations within the "four corners" of the contract. I argue that the Court of Chancery's decision to prioritize the public interest over private ordering is fully justified, not only because giving the fraudster the benefit of judicial enforcement makes the court an accomplice in effectuating unfairness between the parties, but also because judicial enforcement in such instances would operate to unravel the idea of a contract—what it *is* and what it *needs to be* in order to perform the functions the legal form was invented to perform.

In Part IV, I turn to the seventeenth-century *Earl of Oxford's Case*, in which the English Court of Chancery declared the independence and the primacy of equity over common law courts.[25] There, a common law judgment for an opportunistic fraudster came into conflict with the Court of Chancery's understanding of what equity required.[26] The court's reasoning provides occasion to reflect on the fact that our understandings of

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12, 2013), *reh'g of petition for review denied*, No. 12-0669, 2013 Tex. LEXIS 428, at *1 (Tex. May 31, 2013).

20. *Id.* at 192.

21. *See id.*

22. 891 A.2d 1032 (Del. Ch. 2006).

23. *Id.* at 1034–35.

24. *See id.* at 1032.

25. (1615) 21 Eng. Rep. 485 (Ch.).

26. *Id.*

the way law should deal with the injury caused by fraud and deception have deep roots in the struggle to reconcile law and ethics. In the *Earl of Oxford's Case*, that struggle is mediated through the question of the place of equity, understood generally as fairness and justice and specifically as a body of doctrine, in the formal structure of law—a question dating, once again, at least as far back as Aristotle.

All three cases, by their refusal to allow a liar to profit from his fraud, underscore the law's repudiation of deception as more than "mere bullshit" for which there is no legal remedy. At the same time, the cases involve very different social relations, and thus offer different perspectives from which to examine the nature of the values at stake in deciding whether to give legal effect or protection to the deceptive actions of a liar. At the intersection of contract and tort law, of common law and equity, these cases mark a common legal site where conceptions of the public interest and ethical duty mark fraud and deceit as a limit on the parties' freedom to establish their own private order through contract.

This is significant because contract and tort law establish two quite different ways of conceptualizing our social relations. Contract law is about enabling individuals to effectuate their own wills.[27] The theory is that, given freedom of contract, parties will discover ways to transact that are mutually beneficial and that enhances society's well-being, on the one hand, by the proliferation of mutually beneficial transactions among its inhabitants and, on the other, by the expansion of the realm of freedom.[28] The realm of freedom is expanded because in contract law, obligations are largely self-imposed and self-defined; the relationship and discourse of the parties *inter se* define the contours of the expectations of each party in the performance and enforcement of the contract.[29] By enforcing the private order effectuated through contracts, contract law maximizes happiness because it allows people to pursue their own ends with the understanding that their contractual expectations will be backed by the enforcement power of the state.

Tort law, in contrast, establishes public norms—general standards of conduct that are imposed regardless of one's individual will or desire—for the benefit of society as a whole and to ensure justice among the parties.[30] In tort law, individuals are understood to owe duties of care to each other that are *defined by society*. Breaching such a duty is viewed as wrongdoing. If such a duty is breached, the courts are open to

27. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (1981).

28. *E.g.*, Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 459 (1994).

29. *E.g.*, *id.*

30. *See id.* at 460.

the victim to obtain a remedy against the wrongdoer. Thus, where contract law expands the realm of freedom by decentralizing the power to order one's affairs as one sees fit, tort law imposes obligations grounded on conceptions of the duties we owe each other as part of a civil society.[31]

Beyond the questions of public interest versus private order, this Article examines how the legal treatment of fraud and deception also implicates the relationship between positive law and equity. Like contract and tort law, positive law and equity also establish two very different ways of understanding how our social relations are configured. From this perspective, the choice is whether to ground social order on inflexible laws of general application or to adjudicate it through case-specific and fact-sensitive determinations that aim to effectuate the requirements of justice as between the parties. I argue that equitable concerns and equity itself are revealed in these cases to be an unavoidable and desirable, and specifically *not* a dangerous supplement to law.

B. *The Completing Role of Equity*

In *Of Grammatology*, the French philosopher Jacques Derrida explores the meaning and power of what he calls the "dangerous supplement."[32] In his readings, the supplement is dangerous because it is what is excluded from our system of signs. It is the uninvited guest who barges into the pre-established order and "adds only to replace. It intervenes or insinuates itself *in-the-place-of;* if it fills, it is as if one fills a void."[33] The appearance of the supplement is seen as a dangerous invasion because "the supplement is *exterior*, outside of the positivity to which it is super-added, alien to that which, in order to be replaced by it, must be other than it. Unlike the *complement*, dictionaries tell us, the supplement is an exterior addition."[34] Equity often serves the role of

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31. *See id.* at 460–61.

32. JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967). Although madly popular now, this is his timeless work on the supplement and privileging.

33. *Id.* at 145 (emphasis added).

34. *See id.* at 145. Over the years, legal scholarship has emerged assimilating Derrida's theory of the "dangerous supplement." *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1288–99 (1984); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007 n.20 (1985) ("An example of the dynamic of the dangerous supplement is contract doctrine's stressing of objective interpretations of contractual intent over subjective ones, invoking both the difficulty of assessing subjective intent, and the loss of predictability, stability, certainty, and security that reliance on subjective intent would produce. Yet subjective intent retains a tolerated supplemental position in contract doctrine, being invoked quite explicitly to resolve certain doctrinal problems."); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 759–60 (1987); Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2358 (2001)

supplement to law as is demonstrated in the three cases discussed in this Article. I argue that in supplementing the law, however, equity historically has served the critical role of completing law, without disrespecting it.

While the three cases examined here concern disputes arising in very different social contexts and appear to be governed by different bodies of law—from Texas state law on marriage and divorce, to the Delaware Court of Chancery precedents governing stock purchase agreements, to a seventeenth-century English statute restricting the transfer of property owned by colleges and cathedrals—all three cases share a common element insofar as they demonstrate how courts invoke equity to prevent fraudsters from using the law to effectuate their frauds. Though the relationship between law and equity has, since its inception, been fraught with the tension of embattled adversaries, in these cases, I show that equity supplements the law in a way that completes, rather than displaces, and for this reason the achievement of justice depends on an intelligent coordination of their different, but equally important, roles. Moreover, in seeing how the courts invoke equity across these different contexts in order to achieve justice between the parties and secure the integrity of the law itself, we can see more clearly the injury that fraud and deception inflict, as well as the costs of dismissing the significance of deception as "mere bullshit."

(defending against modernists' criticisms that "postmodern legal scholarship is nihilistic and potentially dangerous"); Madeleine M. Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE UNIV. L. R. 215, 228–29 (1997); Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence through Dissent*, 122 HARV. L. REV. 4, 27 (2008) ("Oral dissent is not just a stage for conventional speech; it stands as a sanctuary for the free expression of dissent. One could argue that the focus on oral dissents constructs judicial orality (speech) as a kind of dangerous supplement in the sense of its potential to subvert dominant (or majority) legal discourses, but also privileging speech over writing, with some similarity to the way the canonical dichotomy has functioned.").

For discussions of the evolution of postmodern legal scholarship, see generally GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1993); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. NOT!*, 28 HARV. C.R.-C.L. L. REV. (1993) (modeling an anti-essentialist liberation legal theory at the intersection of identity politics and structural analysis); Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1 (2000–2001) (mapping the genealogy of LatCrit theory as a historically contingent intervention in the evolution of American critical legal theory). *See also* Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 711 (2000).

II. *MOORE V. MOORE*: OPERATOR OF THE HEART—OR THREE SHELLS AND A PRENUPTIAL AGREEMENT

Consider the Texas family court case of *Moore v. Moore*.[35] In this case, Gary Moore hid his net worth from his fiancée, Caroline Feherty, and induced her to sign a prenuptial agreement ("prenup") just hours before their wedding.[36] The prenup sought to severely limit the rights that she would otherwise have under Texas law to receive alimony and a share in the community estate created during the marriage.[37] The story of Gary's efforts to enforce the terms of this prenup began when he filed for divorce in July 2007, but his efforts did not end until May 31, 2013, when the Texas Supreme Court rejected his last appeal.[38]

A. *The Deceitful Courtship: A Time for Premarital Wooing and Screwing*

Gary Moore and Caroline Feherty met in January 2004, were engaged in May, and married by June of that year.[39] When they first met, Gary laid it on. He told Caroline he had been having financial difficulties for years and was just then "digging himself out of a hole."[40] Apparently, financial woes can be irresistible catnip—a powerful, amo-

35. 383 S.W.3d 190 (Tex. App. 2012).

36. The story of *Moore v. Moore* is taken from a published opinion of the Court of Appeals of Texas in Dallas. *Id.* at 196. The appellate court reviewed and weighed all of the evidence presented at the bench trial for factual and legal sufficiency of the trial court's findings, according these findings "the same force and dignity as a jury verdict's upon questions" and "under the same standards that are applied in reviewing evidence to support a jury's answers." *Id.* at 195 (citations omitted). The court assessed whether the legal sufficiency "would allow reasonable and fair-minded people to reach the verdict under review" and whether the factual sufficiency of the evidence was "so weak or the finding so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* The court specifically found that the evidence of fraud presented by Caroline at trial met the applicable standard of review for legal and factual sufficiency, that Gary's evidence was neither "so compelling [nor so] overwhelming as to negate or override the trial court's involuntariness finding." *Id.* at 196. Accordingly, the appellate court affirmed the trial court's judgment against Gary. *Id.* at 201. Because the appellate court took great care to frame the facts in the case, its understanding of what transpired, and especially the evidence upon which findings of fraud and "trick or artifice" had been found below and affirmed, I have relied heavily on the appellate court's opinion in threading the analysis of this case. Where probative and appropriate, I have also included references to the record below. "Prenup" and "prenuptial agreement" are used in the alternative, depending upon the context. Use of the term "prenup" is meant to convey the tone people use conversationally and as Gary did at the time of negotiating with Caroline; my intent in using "prenup" is to convey how the shortened term might convey a blasé attitude about such an important document.

37. *See id.* at 193, 196.

38. *Id.* at 190, *reh'g overruled* (Nov. 29, 2012), *review denied* (Apr. 12, 2013), *reh'g of petition for review denied*, No. 12-0669, 2013 Tex. LEXIS 428, at *1 (Tex. May 31, 2013).

39. Brief of Appellee at 1, Moore v. Moore, 383 S.W.3d 190 (Tex. App. 2012), No. 05-10-00498-CV, 2011 WL 1686560.

40. *Moore*, 383 S.W.3d at 193.

rous elixir—to some, as Caroline remained interested enough in Gary to continue the courtship notwithstanding his self-reported financial difficulties.

Shortly after their engagement, Gary popped a different question: How did she feel about a prenup?[41] He told her that he "required" her to sign a prenup before getting married.[42] He wanted to protect her from his "loans, liens and lawsuits," he wooed.[43] She was okay with that.[44] This was the initial fraudulent utterance in the case, according to Caroline.[45] At trial, Caroline offered evidence that Gary was not in a financial hole and the purpose of the prenup would turn out to be quite different from the purpose he represented to Caroline.[46] Even though the lie's deceptive nature was unknown to Caroline at the time of its utterance, the prenup eventually became the textual site where a Texas family court had to decide whether Gary would be allowed to enforce the contractual rights he extracted from his future wife through a pattern of trick and artifice that began with this lie. This is because Gary's initial lie is the kind of lie that thereafter compels the liar to lie about many things within the relationship in order to keep the initial lie from being discovered. As revealed by the record of the couple's divorce proceedings, trick and artifice followed his initial misrepresentation, all taking place in a carefully concocted state of pressure and manipulation, overlaid with more than a soupçon of "hide the prenup."[47]

Gary assured Caroline that the prenup would be a collaborative process: a three-way of sorts, between himself, Caroline, and Gary's longstanding business lawyer, Marty Barenblat, who it appears *never disclosed* to Caroline that, as Gary's attorney, he had a conflict of interest in representing her as well.[48] In early June, Barenblat went to work drafting the prenup.[49] Caroline wanted to hire a board-certified family

41. *Id.*

42. Brief of Appellee, *supra* note 39, at 2.

43. *Id.*

44. *See Moore*, 383 S.W.3d at 193.

45. *Id.* at 196.

46. Guided by common law concepts, the court presented a series of facts establishing evidence of involuntariness. *See id.* This evidence included "misrepresentations made in procuring the agreement . . . and [e]vidence of fraud and duress." *Id.* at 195. Specifically, "Caroline presented evidence that before she married Gary, he misrepresented his financial condition and claimed he wanted her to sign a premarital agreement to protect her from 'loans, liens, and lawsuits.'" *Id.* at 196 (citations omitted).

47. *See* Brief for Appellee, *supra* note 39, at 16–23.

48. *Moore*, 383 S.W.3d at 193. The court found these maneuvers amounted to "trick or artifice." *Id.* at 196–97 ("As an initial matter, we conclude there was evidence of artifice that prevented Caroline from getting legal advice about the final draft of the agreement.").

49. *See* Brief for Appellee, *supra* note 39, at 2.

lawyer to assist her with the agreement.[50] She found two family law specialists, but Gary vetoed them as too expensive.[51] Realizing that the prenuptial agreement might be tossed out unless Caroline had her own separate legal representation, Gary offered to pay her legal fees and referred her to Charles Hunt, an estate-planning lawyer down the hall from his own lawyer, Barenblat.[52] Barenblat made the initial contact, set up the first appointment for Caroline, and supplied Hunt with the documents—including a new version of the prenup.[53] This version, unlike a previous version he had shown to Caroline, did not contain any attached schedules of Gary's assets and liabilities, nor did it contain any waivers of disclosure.[54]

Caroline first met with Hunt nine days before the wedding.[55] Together, they reviewed the prenup drafted by Barenblat.[56] Hunt advised her that he needed to have the referenced schedules of Gary's assets and liabilities attached, and these needed to be completed with full disclosure, including the account numbers and values.[57] He counseled, that without these, Caroline would be signing away rights without knowing what she was giving up.[58] Hunt also proposed additional changes throughout the prenup.[59] Following a one-hour meeting, Caroline departed Hunt's office with the understanding that Hunt and Barenblat would redraft the prenup to satisfy Hunt's expressed concerns.[60]

In the meantime, Gary communicated to Caroline that the attorneys were working on a final draft—which incorporated her changes—and that the prenup would be ready on June 17 or 18, 2004.[61] On June 17, Hunt met with Barenblat and supplied him with the revisions he required before he would recommend to Caroline that she sign the prenup.[62] Barenblat said he would return to Hunt with a new document reflecting the requested changes, but he did not.[63] Instead he "removed all reference to any values in the [prenup] and added schedules that did not

50. *Id.*

51. *Moore*, 383 S.W.3d at 193.

52. *Id.*; *see also* Brief for Appellee, *supra* note 39, at 2.

53. Brief for Appellee, *supra* note 39, at 2.

54. *See Moore*, 383 S.W.3d at 193.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; *see also,* Brief for Appellee, *supra* note 39, at 21 ("Hunt could not advise [Caroline] to sign the final document because he never saw it. He could not advise [her] to sign without knowing the size of the estate and what she would be waiving by the agreement.").

59. Brief for Appellee, *supra* note 39, at 2.

60. *Moore*, 383 S.W.3d at 193.

61. Brief for Appellee, *supra* note 39, at 2–3.

62. *Moore*, 383 S.W.3d at 193.

63. *Id.*

include values."[64] Barenblat did not communicate again with Hunt after this meeting.[65] That evening, on June 17 at 7:00 p.m., Barenblat emailed Caroline and Gary—but not Hunt—to tell them that the prenup was ready and that Caroline could pick it up at his office.[66]

The next morning, Caroline planned to stop by Barenblat's office to get the prenup; however, when she called Barenblat, he told her that the prenup was not ready because he was still making Hunt's requested revisions.[67] Later that day, at 4:41 p.m., without contacting Caroline, Barenblat sent the prenup to Gary's house in Big Spring via express delivery.[68] Still looking for the prenup and unaware of its delivery to Gary, Caroline called Barenblat's office again at 6 p.m.[69] She was told that he could not give her the prenup because he had already sent it to Gary's home in Big Spring.[70]

In this telephone exchange, Barenblat also told Caroline that Hunt had approved the final version, now in Gary's possession, and that Hunt had said the prenup was now "okay to sign."[71] At trial, Hunt denied having heard a peep from Barenblat after he gave Barenblat the proposed changes to the prenup.[72] Hunt also denied receiving any version of the revised prenup for review prior to the final version being delivered to Gary in Big Spring.[73] Lastly, Hunt denied having said that the prenup was "okay to sign."[74] The appellate court correspondingly found that Barenblat made a "direct false factual representation" that Caroline's attorney had reviewed and approved the prenup.[75]

On Saturday, June 19, Caroline drove to Big Spring to join Gary for one last night at his home before they would travel together to Martha's Vineyard to be married.[76] Upon arriving, Caroline asked Gary if he had received the prenup.[77] Gary lied.[78] He told her that he had not

64. *Id.*
65. *Id.*
66. Brief for Appellee, *supra* note 39, at 3.
67. *Id.*
68. *Id.*
69. *Id.*
70. Moore v. Moore, 383 S.W.3d 190, 193 (Tex. App. 2012).
71. Brief for Appellee, *supra* note 39, at 3.
72. *Id.*
73. *See id.* at 3; *Moore*, 383 S.W.3d at 194.
74. Brief for Appellee, *supra* note 39, at 3.
75. *Moore*, 383 S.W.3d at 197.
76. *Id.* at 193–94.
77. *Id.* at 194.
78. *See id.* Gary argued that he did not hide the agreement, but the court was evidently not persuaded by whatever evidence Gary presented to that effect. Instead, the court concluded, "He then made it effectively impossible for Caroline's lawyer to review the final draft by *misrepresenting* to her that he did not have the agreement when they went to Martha's Vineyard

received it when in fact he had secreted it in his luggage.[79] Instead, he told her that it was going to be delivered to Martha's Vineyard.[80] On Sunday, June 20, the couple flew from Big Spring to Martha's Vineyard.[81] Caroline testified that in the four-day run-up to the wedding, Gary would periodically ask the front desk at the hotel they were staying "to see whether any documents had arrived."[82] From Caroline's perspective, the week-long charade of regular trips to the front desk induced her to believe that the final version of the agreement had not yet arrived.[83]

Waiting until only hours before the wedding, Gary finally produced the prenup that his lawyer had prepared.[84] Caroline assumed that it had just been delivered to Martha's Vineyard.[85] "She was in a panic" reviewing the prenup, which was now a clean version, with no indication of the changes or revisions.[86] The attached schedules of assets and liabilities did not contain values, and Gary now gave her for the first time an additional document—a waiver of disclosure.[87] She did not understand the documents, and in a panicked state, telephoned Hunt, whom she was unable to reach.[88]

Meanwhile, the clock ticked on as the appointed hour for the couple to appear for their wedding ceremony approached. So Gary called Barenblat, and, through Gary, Barenblat again assured Caroline that Hunt had approved the documents, restating that Hunt had said it was "okay to sign."[89] Shortly thereafter, Gary and Caroline executed the prenup.[90] Within hours, they were married, although Caroline later said she would not have signed the prenup had she known that her attorney was not contacted to review it and did not approve it.[91] She would not learn that Hunt did not approve the final version of the prenuptial agreement until it was revealed during the divorce litigation.[92]

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and then *hiding* the agreement for several days until just hours before their wedding." *Id.* at 196 (emphases added).

79. Brief for Appellee, *supra* note 39, at 3–4.

80. *Moore*, 383 S.W.3d at 194.

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.*

85. *Id.*

86. Brief for Appellee, *supra* note 39, at 4; *see also Moore*, 383 S.W.3d at 194.

87. *Moore*, 383 S.W.3d at 194.

88. *Id.*

89. Brief for Appellee, *supra* note 39, at 4.

90. *Moore*, 383 S.W.3d at 194.

91. *Id.* The record showed sufficient evidence of involuntariness to satisfy the appellate court. "The trial court could find based on this evidence that Caroline did not sign the agreement voluntarily." *Id.* at 196.

92. *Id.* at 194; Brief for Appellee, *supra* note 39, at 20 (asserting in her appellate brief that

1. THE PRENUP

The prenup became effective once the marriage had been solemnized. And so, as of June 25, 2004,[93] Caroline and Gary appeared to have signed away all rights in the marital community property the Texas legislature had established as the default arrangement for residents of the "five states of Texas."[94,95] Right from the start, it is important to understand that it is relatively recent that prenuptial agreements have become generally or presumptively enforceable in the event of divorce.[96] Traditionally, the marital relationship has been understood as a status relation, in which the state establishes, defines, and enforces the corresponding rights and obligations that bind parties to each other on account of their marriage.[97] The recognition of prenuptial agreements as a vehicle for altering the property divisions and other economic interests upon divorce reflects the state's decision to allow persons about to be married to contract around the status-based rights and obligations otherwise dictated by the state.[98] It reflects the state's deference to the parties' freedom to agree on their own private ordering of property distributions that will best reflect their own understandings of their relationship to each other.[99]

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that she would not learn that Hunt did not approve the final version of the prenuptial agreement until it was revealed during the divorce litigation).

93. *Moore*, 383 S.W.3d at 193.

94. *See* Petition for Review at Ex. E at 1–5, Moore v. Moore, (No. 12-0669), 2013 WL 820203, motion for rehearing for review denied (Tex. May 31, 2013).

95. The reference made here is to the feature film *Bernie* released by Millennium Studio (2012). MIGLEXFilms, *Bernie Movie – Map of Texas*, YOUTUBE (May 19,2012), http://www.youtube.com/watch?v=JREkqCvLzSo (noting in a mock documentary "maps" of the widely diverse cultures and expansive geography of the great state of Texas).

96. William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1916–17 (2012) ("State courts traditionally enforced premarriage (antenuptial) agreements between spouses to divide property and assets in the event of the death of either spouse but did not enforce such spousal agreements dividing assets and determining or waiving support obligations in the event of a divorce. . . . Since 1970, the states have modified that mandatory rule . . . . [A]ll the states in the union and the District of Columbia have replaced a mandatory rule (statutory division of assets upon dissolution of civil marriage) with a default rule that the spouses can override by contract, including antenuptial agreements." (footnotes omitted)); *see also Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2075–98 (2003) (discussing the future of antenuptial agreement law).

97. *See generally*, Dennis I. Belcher & Laura O. Pomeroy, *For Richer, for Poorer: Strategies for Premarital Agreements*, PROB. & PROP. MAG. Nov.–Dec. 1998, at 55–56 (explaining the history of premarital agreements and the provisions of the Uniform Premarital Agreement Act of 1983); *see also* Eskridge, *supra* note 96, at 1917–19.

98. *See* Eskridge, *supra* note 96, at 1917.

99. "The rules governing premarital agreements should be construed as broadly as possible to allow the parties flexibility in contracting as to their property rights." WILLIAM V. DORSANEO III & JOSEPH W. MCKNIGHT, *Premarital* Agreements, *in* TEXAS LITIGATION GUIDE § 363.41[1], at 363–57 (Matthew Bender & Co. 1998) (1977); *see also* Williams v. Williams, 569 S.W.2d 867,

Put differently, the recognition of prenuptial agreements as contracts enforceable by judicial process imports into the regulation of marriage the logic of freedom of contract, which generally provides that the state must keep a hands-off approach to assessing the substantive terms of an agreement negotiated at arm's length.[100] In the context of marriage and divorce, this deference to the self-determination of the parties arguably prohibits the state from deciding for the spouses whether the terms of their prenuptial agreement are unreasonable or unfair.[101] Consequently, a prenuptial agreement might very well wipe out the state-supplied legal status, benefits, and property rights ordinarily conferred to married persons *inter se*.[102] In *Moore*, the prenup not only altered the traditional legal treatment and allocation of the marital community property[103] but purported to eliminate the parties' right to alimony and maintenance as well.[104] In addition, by signing the agreement, Gary and Caroline each averred, under the express terms of the agreement, that they had been represented by independent counsel—even though Caroline's attorney did not advise her to sign the final document because he never saw it;[105] that they had each freely chosen their own attorneys—even though Hunt had been selected for Caroline because he was the

870 (Tex. 1978) ("[Texas's premarital agreement] statute should be construed as broadly as possible in order to allow the parties as much flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated." (citations omitted)).

100. "[Prenuptial] agreements are generally construed according to the principles applicable to the construction of other contracts . . . ." 5 WILLISTON ON CONTRACTS § 11:8 (4th ed. 2013); *see also* Mabus v. Mabus, 890 So. 2d 806, 818 (Miss. 2003) ("An antenuptial contract is just as enforceable as any other contract."); Critchlow v. Williamson, 450 So. 2d 1153, 1156 (Fla. Dist. Ct. App. 1984) ("In interpreting prenuptial agreements, the courts are guided by the same principles which control the construction of other contracts." (citations omitted)); *cf.* Lugg v. Lugg, 64 A.3d 1109, 1110–11, 1113 (Pa. Super. Ct. 2013) (In *Lugg*, the court upheld a postnuptial agreement based on a handwritten letter by the wife, who offered to waive full disclosure of the husband's assets and child support in exchange for certain requests, absent evidence of fraud, misrepresentation, or duress.).

101. Marsh v. Marsh, 949 S.W.2d 734, 739 (Tex. App. 1997) (holding that premarital agreements are presumptively enforceable). A prenuptial agreement is enforceable if it is procedurally fair, and an otherwise unfair distribution of property is valid and binding. *E.g.*, In re Marriage of Bernard, 204 P.3d 907, 911 (Wash. 2009).

102. *See* Eskridge, *supra* note 96, at 1917.

103. *See* TEX. CONST. art. XVI, § 15 (1999) (detailing the traditional separate and community property of husband and wife).

104. *See* Petition for Review, *supra* note 94, at Ex. E at 10, 15.

105. *See id.* at Ex. E at 15. As the court recited its understanding of the events: "Caroline later discovered that Hunt never reviewed the changes that were made, never reviewed the final draft, and never told Barenblat that it was okay for her to sign. Indeed, Hunt testified at the hearing that he would not have even given Barenblat permission to speak to his client about the agreement." Moore v. Moore, 383 S.W.3d 190, 194 (Tex. App. 2012).

only lawyer whose fees Gary had been willing to pay;[106] and that each party's attorney had fully explained the meaning and legal consequences of the prenup—even though Hunt never saw the agreement that recited these claims.[107] The agreement also purported to establish, in express terms, the information each signing party relied upon in executing the prenup:

> Each of the parties acknowledges that: . . . (c) . . . she has given informed consent to this [a]greement and *was not subjected to fraud*, duress or *overreaching*; (d) neither Party has relied upon any representations, verbal or written, made by the other Party; (e) neither Party has been pressured in any manner to sign this [a]greement . . . and (i) this [a]greement is not unconscionable.[108]

In addition to these recitals, Caroline was asked to sign a newly attached document, not previously presented to her, which was entitled, "Voluntary Waiver of Further Disclosure."[109] This document included additional averments to the effect that

> Prior to the signing of our Premarital Agreement, we have received and reviewed the written disclosures which are attached as Schedules A through D to the Premarital Agreement. . . .
>
> We each consider the disclosures on the attached Schedules A through D to be fair and reasonable disclosures of the properties and financial obligations of the other party.
>
> We each hereby voluntarily and expressly waive our respective rights to any further disclosure of the properties and financial obligations of each other beyond the disclosures attached as Schedules A through D.
>
> We each acknowledge that each of us has been offered an opportunity to further investigate the property and the financial obligations of the other, and we each voluntarily and expressly waive our respective opportunity for further investigation.[110]

On July 16, 2007, Gary sued for divorce and sought enforcement of

106. *See Moore*, 383 S.W.3d at 193.

107. *See id.* at 194; *see also* Petition for Review, *supra* note 94, at Ex. E at 15.

108. Petition for Review, *supra* note 94, at Ex. E at 16 (emphasis added). The court specifically rejected Gary's argument that the agreement barred Caroline from presenting any evidence in support of involuntariness or "trick or artifice." *Moore*, S.W.3d at 196–97 ("The agreement recited that Caroline's attorney reviewed the agreement, that Caroline read and understood the agreement, and Caroline was signing the agreement voluntarily. According to Gary, we are required to presume the recitations in the agreement were true even though *the evidence showed the recitations were false*. . . . Gary cannot preclude Caroline from making this showing by including recitations in the very agreement that she alleges was not voluntarily signed." (emphasis added)).

109. *See Moore*, 383 S.W.3d at 196; Petition for Review, *supra* note 94, at Ex. F at 1.

110. Petition for Review, *supra* note 94, at Ex. F at 1.

the prenup.[111] Caroline countersued, arguing that the prenup was not enforceable.[112] The case was decided pursuant to a bifurcated trial; in the first stage, the enforceability of the prenup was tried over June 5 and 6, 2008.[113] The trial judge found that the prenup was unenforceable on the grounds that Caroline had not signed the agreement voluntarily.[114] The second stage of the bifurcated trial on the division of the marital estate began one year later, on June 3, 2009.[115] The court found that the aggregate value of the marital community's interest in Gary's businesses was $2,798,246.06 and awarded Caroline her legal share of the community property as well as prospective—and unconditional—appellate attorney's fees.[116]

The appellate court focused on evidence of Gary's premarital pattern and practice of misrepresentations, manipulations, and failures to disclose information to Caroline.[117] This focus included evidence of Gary's initial misrepresentation to Caroline that he was in a financial hole—the first big lie, at least from Caroline's perspective.[118] The court also considered the following: (1) his attempts to isolate Caroline from legal counsel by collaboratively writing the prenup with his own lawyer;[119] (2) his backing out of that scheme only *after* he realized that her legal isolation would make the prenup vulnerable to easy attack;[120] (3) his orchestrated rejection of multiple legal counsel Caroline had found on her own over whom he did not have a sphere of influence;[121] (4) directing her instead to a lawyer over whom he perhaps expected he could exert some control, both by paying Hunt's legal bill and by whatever leverage he may have expected to get from the fact that Hunt shared an office with his own lawyer;[122] (5) the stonewalling by Barenblat of Caroline's requests to see the final version of the prenup, fol-

111. Brief of Appellant, Moore v. Moore, 383 S.W.3d 190 (Tex. App. 2012) (No. 05-10-00498-CV), 2011 WL 544682, at *4.

112. *Id.* Caroline also argued that Gary had committed fraud on the marital estate by operating his businesses as an alter ego. The trial court did not find sufficient evidence supporting the piercing of the corporate veil allegations in this case. Petition for Review, *supra* note 94, at Ex. A at 2.

113. Brief of Appellant, *supra* note 111, at *4.

114. *Moore*, 383 S.W.3d at 192–93.

115. Brief of Appellant, *supra* note 111, at *5.

116. *See id.* at *7–8.

117. *See Moore*, 383 S.W.3d at 196.

118. *Id.* "At trial, Caroline presented evidence that before she married Gary, he misrepresented his financial condition and claimed he wanted her to sign a premarital agreement to protect her from 'loans, liens, and lawsuits.'" *Id.*

119. *Id.*

120. *Id.* Interestingly, neither the court nor the record make clear if Gary realized this because his lawyer told him, or if he discovered this *prima facie* requirement on his own.

121. *Id.*

122. *Id.*

lowed by days of Gary hiding the agreement in his suitcase and producing it only a few hours before the wedding;[123] (6) springing a different version of the prenup, which concealed his wealth with no disclosed values and no evidence of tracked changes, along with an entirely new document whose intent was to effect a waiver of disclosure rights;[124] and (7) his affirmative assurances to Caroline that Hunt had said this prenup was okay to sign.[125]

2. What Gary Hid

The court's final valuation of the marital estate was based on the court's analysis of the property interests Gary had hidden from Caroline—interests that were only ever revealed because the prenup was invalidated and thus the marital estate was subject to disclosure for purposes of division between the spouses upon divorce.[126] These disclosures revealed that, since 1985, Gary had built and operated various movie theatres located principally in Texas.[127] These movie theatres and related businesses formed the greater part of the marital estate.[128] The appellate court noted, however, that the value of the theatres might be subject to complete manipulation because Gary also owned the general contracting and management property companies to which his theatres purportedly owed debt.[129] These businesses either constructed or remodeled Gary's movie theatres and, once built, operated and managed them.[130]

Gary argued that he had amassed *his* estate over the course of

123. *Id.*; *see infra* note 246 (explaining role of timing of signing of prenup as not dispositive of duress or involuntariness under Texas law).

124. *See Moore*, 383 S.W.3d at 196.

125. *Id.*

126. *See* Brief of Appellant, *supra* note 111, at *5.

127. *Id.* at *1.

128. *See* Petition for Review, *supra* note 94, at Ex. B at ¶ 28.

129. *See Moore*, 383 S.W.3d at 199. At the final trial, regarding the valuation of the marital property, Gary argued that five of the seven theatre businesses included in the community estate were worth $1. *Id.* at 197; Brief of Appellee, *supra* note 39, at 5. Using an income approach, Gary's valuation expert set the community's shareholder interest in the relevant six cinemas and one café at a total of $358,005. *Moore*, 383 S.W.3d at 197. Caroline's valuation expert, also using an income approach, ultimately concluded that the community's ownership interest in the six cinemas was $6,653,154, after the trial court ruled, with respect to three of the seven entities Gary owned, that the management fee charged by Gary's separate management company be reduced to the "industry standard" for management fees. *Id.* at 198. Furthermore, the debt, which accounted for Gary's expert lowering the overall value of the businesses, "was not recorded until two months before trial." *Id.* at 199.

130. Brief of Appellant, *supra* note 111, at *1. For example, Gary was the sole shareholder of Pearland Cinema Operating Company ("PCC"). *Id.* PCC owned and operated sixteen theatres. *Id.* at *1 n.1. Premiere Development Company ("PDC"), also solely owned by Gary, was the general contracting company that built or renovated certain theaters that were designed and managed by PCC. *Id.* at *1.

twenty years.[131] He had only known Caroline for a few months prior to their engagement and only six months prior to their wedding.[132] It was not entirely unreasonable or surprising that Gary would want to have a prenup to protect himself in the event that Caroline dumped him within a year or two of the wedding.[133] Under Texas family law principles of community property, Caroline—a woman he had met only months before they wed—stood to walk away with half of the assets of the community estate created *during the marriage*—unless he got her to sign a prenup.[134] Indeed, once the prenup was voided, Texas law recognized Caroline as Gary's ex-spouse with whom he was required to share the nearly $3 million community property he had aimed to hide from her.[135]

The odd thing about all of the evidence showing Gary's tricks and artifice is that Caroline had asserted that she was willing to a sign *a* premarital agreement.[136] So why the week-long charade of daily trips to the front desk pretending that the prenup had not yet arrived and was therefore not available for her to examine? Perhaps Gary feared that if provided with the prenup days, rather than hours, before the wedding, Caroline might have had the time to understand fully the agreement and assess the implications of the rights Gary was demanding that she relinquish. This is especially true given the extent to which he was *not* in a "financial hole," as Caroline claimed Gary told her. After all, this was the kind of lie that might, if discovered, destroy her fundamental understanding of and trust in his representations of himself, his objectives, and his motives.

Her lawyer had been crystal clear. He would not approve a version of the prenup that had blank values, and until those were disclosed and other terms modified, he refused to counsel her to sign it.[137] Caroline understood and had agreed that she would not sign unless Hunt reviewed the agreement.[138] Perhaps Gary feared that if she were to learn the extent of his wealth at the time of the wedding, she might have come to one of two conclusions: (1) that he did not really love her the way he may have

131. Brief of Appellant, *supra* note 111, at *18.

132. *See* Brief of Appellee, *supra* note 39, at 1.

133. The irony is that Gary dumped her and then lost in his legal arguments because they were found to be without merit. *See generally Moore*, 383 S.W.3d 190.

134. *See* TEX. CONST. art. XVI, § 15 (1999).

135. *Moore*, 383 S.W.3d at 192–93.

136. *Id.* at 193.

137. Brief of Appellee, *supra* note 39, at 20. Yet another irony in this farce is that the assets that are supposed to be disclosed are, by definition, separate assets, not subject to later claim by the spouse-to-be, although they may be the source of income during the marriage—that income, in some circumstances, would be part of the community property that is owned equally by both spouses.

138. *See Moore*, 383 S.W.3d at 194.

wanted her to believe that he did, or (2) that notwithstanding any professed love for her, he was fundamentally a selfish and inequitable man. Drawing either conclusion, Caroline might have found that he was simply not who he represented himself to be, and this might have led her to decide not to marry him after all. But Gary wanted to marry her *and* keep his money. You might say, he wanted to have his wedding cake and eat it too. His chance at accomplishing both depended on getting Caroline to sign a prenup that allowed him to keep his substantial sum of undisclosed wealth tucked safely away from his new wife until and unless he decided to share it. And he was okay with lying to her in order to accomplish his combined objectives.[139]

It is worth noting that the record does not indicate that Gary ever told Caroline that he loved her, but my argument here is that it is a fair inference that he did—given the context of the drama unfolded by the method of narrative-in-reverse.[140] In this approach, the challenge is to draw on the context known to exist in the world beyond (and before) the facts established by the record—a world within which the record facts are embedded and from which they emerge through the operation of the substantive, procedural, and evidentiary practices that constitute the legal system—in this instance, the Texas family court. In this broader context, it is fair to infer that Gary told Caroline that he loved her, or in some other way communicated that idea and that he knew and intended that she would understand his communication to mean that he wanted, and indeed promised, at least to be equitable in his dealings with her and treatment of her. It is also fair to infer that Caroline at some authentic level relied on the meanings she would reasonably be induced to believe by whatever method Gary may have used to communicate the idea that he loved her, though Gary did not in fact really mean them. Understanding the prenup might have helped Caroline to see that, and her understanding of this basic truth about Gary is understandably something anyone in Gary's position would have a strong interest in hiding from her—at least until he achieved his objective of marrying her.

All of the above is an example of narrative-in-reverse. It is not in

139. As the court specifically observed, Gary's "misrepresenting to her that he did not have the agreement" ensured that Caroline would not obtain legal counsel or know the value of Gary's estate. *See id.* at 196.

140. To my knowledge, this novel term *narrative-in-reverse* did not exist prior to its appearance in this Article and is used here for the very first time. By narrative-in-reverse, I mean a process of inferring facts about the world outside the record based on the way our understanding of the world makes sense of the facts that are in the record. It is *not* urged as a method for courts to make findings of fact not based on evidence in the record, but rather as a method for observers of the law to assess its operation in light of what we know about the world beyond the record. It is in this sense similar to reverse engineering. For further discussion and illustration of this method, see infra notes 366, 438, and accompanying text.

the record, but rather an interpretation of the record by reference to a context broader than the legal system will allow us to see. With respect to the record, it appears as a supplement. Assessing equity, however, requires us to be able to understand and access this broader context because seeing beyond the limited set of facts the legal system allows us to see is in some cases the condition and prerequisite for doing equity. This is because equity prevents persons from exercising their rights when doing so would be against conscience; conscience, in equity's original understanding, did not mean moral conscience, but rather private knowledge of facts unprovable at common law, owing to the common law rules of evidence.[141]

3. WHAT GARY GOT

As it turned out, the marriage did not last. About two years after the wedding, Gary and Caroline were living in separate residences, and it was Gary who filed for divorce on July 16, 2007, nearly three years to the day of the wedding.[142] Five months prior to his filing for divorce, Caroline begged Gary to "tear up" the prenup.[143] He refused, choosing instead to stand on his rights. Together with the divorce petition, he moved to enforce the prenup, but Gary lost.[144] He lost the wife. He lost the trial. He lost half of that portion of his wealth recognized as community property.[145] He lost his appeal.[146] He lost his petition for review of the intermediate court of appeals by the Texas Supreme Court, and after he lost that petition, he lost again, when his lawyer filed a second motion asking the Texas Supreme Court to rehear the petition it had previously denied.[147] Instead of getting the girl and keeping the money, he paid, and paid, and paid. He paid Caroline. He paid her lawyers. Presumably, he paid his own lawyers. The question is whether he got what he deserved.

Returning to Frankfurt's *On Bullshit*, I begin by noting that Gary is

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141. *See, e.g.*, Dennis Klimchuk, Is the Law of Equity Equitable in Aristotle's Sense? (Sept. 16, 2011) (unpublished manuscript), *available at* http://www.law.ucla.edu/workshops-colloquia/Documents/Klimchuk.%20Is%20the%20Law%20of%20Equity%20Equitable%20in%20Aristotles%20Sense.pdf. To be sure, the understanding of the conscience of equity has also been evolving and in flux. As Plowden indicates, "If there is any defect in the law, it should be reformed by equity, which is no part of the law, but a moral virtue which corrects the law." *Id.* at 10 (citation omitted).

142. Petition for Review, *supra* note 94, at 4.

143. *Id.* ("In February or March 2007, Caroline asked Gary to tear up the PMA.").

144. Moore v. Moore, 383 S.W.3d 190, 192 (Tex. App. 2012).

145. *See* Petition for Review, *supra* note 94, at Ex. B at 4 (The trial court found that the community had an interest of $2,798,246.06 in five entities that operated cinemas.).

146. *Moore*, 393 S.W.3d at 201.

147. *Id.*, *reh'g overruled* (Nov. 29, 2012), *review denied* (Apr. 12, 2013), *reh'g of petition for review denied*, No. 12-0669, 2013 Tex. LEXIS 428, at *1 (Tex. May 31, 2013).

not what Frankfurt would call a "mindless slob."[148] His deceit was not bullshit that simply made a mess of the truth.[149] Instead, his actions reveal the carefully coordinated scheme of a conniver, who was intent on convincing his fiancée that what was false was nevertheless true. According to Frankfurt, "[t]elling a lie is an act with a sharp focus. It is designed to insert a particular falsehood at a specific point in a set or system of beliefs, in order to avoid the consequences of having that point occupied by the truth."[150] Gary was certainly focused. He knew what he wanted. One can fairly infer that he wanted Caroline to believe that the prenup was designed to protect her from his creditors, while its true purpose was apparently to protect *him* from the consequences of Texas law relating to marital property upon divorce. He wanted her to believe that the final version he had tucked away in his suitcase had not arrived until he was good and ready to present it to her just hours before the wedding. And he wanted her to believe that her lawyer had said it was okay to sign. From the record, one can fairly infer that he knew all of these assertions were false, and that in inducing Caroline to form these beliefs, he was deceiving her.[151]

As Frankfurt argued, the liar shares the bullshitter's desire to get something for nothing; however, the liar is more deliberate, insofar as his objective is to convince his victim that a lie the liar knows to be false is nonetheless true.[152] According to Frankfurt, lying is different from bullshit in that it

> requires a degree of craftsmanship, in which the teller of the lie submits to objective constraints imposed by what he takes to be the truth. The liar is inescapably concerned with truth-values. In order to invent a lie at all, he must think he knows what is true. And in order to invent an effective lie, he must design his falsehood under the guidance of that truth.[153]

B. *Enter Equity—A Narrative-in-Reverse*

The story of Gary's attempt to enforce the prenuptial agreement can be approached from multiple directions. It is worth noting—and emphasizing—that both the following and preceding analysis is an interpreta-

148. FRANKFURT, *supra* note 6, at 21.

149. *See id.*

150. *Id.* at 51.

151. The court concluded that "artifice" and outright fraud "prevented Caroline from getting legal advice about the final draft of the agreement." *Moore*, 383 S.W.3d at 196–97. The court also affirmed the trial court's finding that both Gary's and Barenblat's false assurances established involuntariness. *Id.* at 197.

152. *See* FRANKFURT, *supra* note 6, at 53–55.

153. *Id.* at 51–52.

tion of Gary's story grounded on the legal record and the inferences that can fairly be drawn from that record. Thus, the point of this analysis is not to presume to cast judgment on the actual individual whose story has been revealed to the public, thanks to the legal record that his actions have left as the legacy of his tracks through this world. Rather, it is to understand Gary as the principal character in a narrative, a drama of sorts. One might even call it a morality play, to which we have access only through the record of the legal proceedings arising out of his marriage, divorce, and the prenup that he caused his lawyer to prepare and his fiancée to sign prior to that marriage. It is a narrative we must piece together from the record; the reason to do this is not to judge Gary, but instead to understand and assess the merits or demerits of the way the court decided the issues in the case. Was the court fair to Gary? Was it fair to Caroline? Do the substantive and procedural rules, by which the Texas court system produced the outcome in this case, satisfy us not only that justice was done as between Gary and Caroline, but also that justice can be done regularly and routinely through this system? In other words, is this legal system reliably just?

Narrative, as generally deployed in law, operates by constructing or appropriating a story and then imagining how a set of legal rules might play out given the actions and motives of the characters involved.[154] In narrative-in-reverse, the objective is to look at how the legal rules were applied in a specific case and imagine the motives and interests, which explain the drama that culminated in the lawsuit and this legal outcome. The narrative approach's value is that it places the law in a specific context, so that by reference to its practical consequences for the parties in that imagined context, we can assess whether the law operates justly. By contrast, narrative-in-reverse takes as given the world revealed by the challenges our legal systems have actually confronted in attempting to apply law to resolve real disputes and achieve substantive justice in real cases in order to assess whether a legal system achieves its intended objectives through its allocation of rights and obligations. It is worth underscoring that narrative-in-reverse is not being urged as a method for judicial decision-making. Legal judgment depends on the facts in the record. In turn, the facts in the record depend on the justiciable elements of the substantive claims and defenses, as well as the procedural posture of the case and the rules of evidence. Nonetheless, the way of the world outside a record's four corners can be quite relevant to assessing whether the law delivers justice. Thus, the usefulness of narrative-in-reverse is not for the judge who must judge the facts based on the

154. *E.g.*, Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 OR. L. REV. 943, 956 (1994).

record, but for the observer of the law who must judge the judgment based on the world as we understand it.

For purposes of this Article, the objective is to understand how the Texas state courts deal with the problem of fraud and deception in a world full of bullshit. At this level, the significance of the case stretches far beyond Gary's drama—beyond even the limited field of prenuptial agreements. This is because, in my view, the essence of Gary's fraud was his effort to use the law to "stand on his rights in a bad way."[155] He had his prenup, and you can be damn sure he was going to enforce it, notwithstanding the fact that she begged him to tear it up. But one can imagine that the kind of man who could be persuaded to tear up a contract that tells in his favor simply because his heart strings are pulled by the entreaties of a woman he is about to divorce is most likely not the kind of man who would connive and deceive to secure such a prenup in the first place. Through his pattern of deceit, Gary, intentionally and with premeditation, abused the freedom afforded by the state's willingness to allow persons about to marry to contract out of the division of property, which the state had otherwise established as proper and appropriate given the nature of the marital relation. He abused this freedom because he was not satisfied with simply contracting out of the state's default division of property; he withheld the prenup presumably because he did not want Caroline to understand just how much the prenup altered this default division, nor did he want her to understand the nature and extent of the rights she was thereby relinquishing. To abuse the freedom afforded by the state, he had his lawyer prepare a prenup with a series of provisions that, if upheld, would shield his prenup from ever being undone and would prevent his (or Barenblat's) deceit from ever being uncovered. And to deceive Caroline, he lied.[156] At this level, the question the court had to answer was whether it would allow Gary to use the law in this way.

So, Gary is not the sort of bullshitter Frankfurt would have called a slob, but neither is Gary an equitable man, or rather—to make it about the actions rather than the man—Gary's course of conduct in his dealings with his wife-to-be were, shall we say, less than equitable. In his *Nichomachean Ethics*, Aristotle takes up the task of examining the meaning of "equity and what is equitable—about how equity is related to justice, and what is equitable to what is just."[157] The use of these words in popular discourse triggers a difficulty for Aristotle. On one

155. *See* ARISTOTLE, NICHOMACHEAN ETHICS 101 (Roger Crisp, ed. & trans., Cambridge Univ. Press 2000) (c. 384 B.C.E).

156. *See supra* note 78.

157. *See* ARISTOTLE, *supra* note 155, at 99.

hand, common usage distinguishes equity and justice insofar as they are different words; on the other hand, common usage uses the terms interchangeably so as to create the impression that the different words refer to the same thing. And yet the matters to which the terms refer must either be the same or different; they cannot be both. To resolve this apparent conundrum, Aristotle observes that what is equitable is always just, but what is just is not always equitable: "The same thing, then, is just and equitable, and while both are good, what is equitable is superior. *What makes for the puzzle is that what is equitable is just, but not what is legally just—rather a correction of it.*"[158] Put differently, Aristotle concludes that the law establishes what is just, but what is equitable is actually more just due to the error that law sometimes produces, owing to the law's generality in instances where "one cannot speak correctly in universal terms."[159] Equity corrects the injustice universal legal rules can produce when they are applied to specific cases. From his account of the nature of that which is equitable, Aristotle asserts,

> [i]t is also evident . . . who the equitable person is. He is the kind of person who chooses rationally and who does equitable things; *he does not stand on his rights in a bad way, but tends to accept less than his share, though he has law on his side.* This is the equitable person, and his state of character is equity, which is a sort of justice, not some distinct state.[160]

One might wonder why we should even care what Aristotle had to say about equity some 2,500 years ago. After all, what do Aristotle's views have to do with Gary and Caroline's drama? The answer to both questions is that all three cases examined in this Article involve an appeal to the court's equitable powers—specifically, in Caroline's case, the power to rescind a contract. The equitable powers of state courts, like the Texas family court and the Delaware Court of Chancery, originate in the initial reception of English common law and equity by the former colonies that established the United States after the American Revolution.[161] In England, equity developed as a set of legal doctrines crafted over time "to correct" the operation of the common law in cases where, 1) the application of common law rules produced harsh results, absent the Chancellor's discretion to effectuate justice, or 2) the remedies available at common law, most notably monetary damages, proved

158. *Id.* at 100 (emphasis added).

159. *Id.*

160. *Id.* at 100–01 (emphasis added).

161. *See generally* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968).

inadequate to achieve justice among the parties.[162]

In England, since the fifteenth century, common law and equity were administered by two different court systems.[163] The Judicature Acts of the 1870s merged the courts of equity and the common law in England, though not the systems themselves, into one unified court system and established the primacy of equity.[164] In the United States in the nineteenth century, these systems also merged into a single court system in all but a handful of jurisdictions, which today includes the Delaware Court of Chancery.[165] Through this merger, American state courts obtained the power to administer both common law and equity—a distinction that turned, for the most part, on the nature of the remedy sought and the grounds upon which it is requested.[166] Monetary damages are common law remedies grounded on the rights and obligations established by the letter of applicable law; but in order to get an injunction, secure the specific performance of a promise or, in Caroline's case, to rescind a contract, the litigant must seek equitable relief grounded on principles of equity.[167] The upshot of all of this is that Aristotle's views have a great deal to do with the Texas family court's approach to Gary's drama because the principles of equity recognized in American state courts derive from the development of equity in the English Courts of Chancery.[168] In turn, the development of equity in the English Courts of

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162. *See generally* HENRY HOME, LORD KAMES PRINCIPLES OF EQUITY (Edinburgh, A. Kincaid & J. Bell 1760).

163. *See, e.g.*, Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 4–5 (2005).

164. *See, e.g.*, BLACK'S LAW DICTIONARY 619, 922 (9th ed. 2009) (equity, Judicature Acts).

165. *See* Russell Fowler, *A History of Chancery and Its Equity*, 48 TENN. B.J., Feb. 2012, at 20, 20. For further discussion of the Court of Chancery of the State of Delaware's rich history, see William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery, 1792–1992*, 18 DEL. J. CORP. L. 819 (1993). The "secret of Delaware['s] equity" can be attributed to the Delaware Chancellors' emphasis on providing a remedy, despite procedural or practical problems, and embrace of two key concepts:

> First, equity is a moral sense of fairness based on conscience. Second, equity is the recognition that the universal rule cannot always be justly applied to the special case. Equity is the flexible application of broad moral principles (maxims) to fact specific situations for the sake of justice. Delaware has preserved the essence.

Id. at 821–22 & n.6 (citing The Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486 (Ch.) ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite. That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.")).

166. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 921 (1987) ("[E]quity often developed its own formal rules of both substance and process."); *see generally* William F. Walsh, *Merger of Law and Equity Under Codes and Other Statutes*, 6 N.Y.U. L. REV. 157 (1929) (explaining the merger of law and equity under state law).

167. *See, e.g.*, STEPHEN C. YEAZELL, CIVIL PROCEDURE 281–83 (7th ed. 2008).

168. *See* Fowler, *supra* note 165, at 21.

Chancery borrowed from Aristotle's understanding of the difference between equity and justice and between the equitable and the just.[169]

Gary lost insofar as the trial court declared the prenuptial agreement he sought to enforce against Caroline unenforceable for lack of voluntariness.[170] Not satisfied, Gary appealed.[171] He not only lost again, but this time the Court of Appeals of Texas saw fit to deliver a detailed account of the events, thereby making these facts significantly more accessible as a public record.[172] The question is whether we can understand the case as an application of Aristotle's theory of equity, and if not, whether Aristotle's theory would nevertheless help us better understand the reasons why Gary's pattern of deceit and manipulation fully warranted the court's decision to deny enforcement of the contract—rather than dismissing his deceit as mere bullshit.

1. The Question of Voluntariness

In his appeal, Gary argued that the prenuptial agreement should be enforced because Caroline had signed the legal documents voluntarily.[173] To understand why Gary argued voluntariness, we could certainly turn to Aristotle—though for this purpose we would look to his *Rhetoric*, rather than the *Nichomachean Ethics*. In *Rhetoric*, Aristotle takes up the art of persuasion as it is practiced with respect to laws, witnesses, contracts, tortures, and oaths.[174] The enforceability of contracts is taken up as that subject is treated in the art of rhetoric rather than as a matter of ethics or equity.[175] According to Aristotle, the art of rhetoric is the art of proving opposites.[176] Applied to the enforceability of contracts, the art of rhetoric instructs that the arguments to make depend on whether the contract tells for or against us.[177] If the contract tells *for* us, Aristotle instructs that:

> We may argue that a contract is a law, though of a special and limited kind; and that, while contracts do not of course make the law binding, the law does make any lawful contract binding, and that the law itself

169. *See* Klimchuck, *Aristotle's Sense*, *supra* note 141, at 2.

170. *See supra* Part II.A.1.

171. *See id.*

172. *See id.*

173. Brief of Appellant, *supra* note 111, at *23.

174. 2 Aristotle, *Rhetoric*, *in* The Complete Works of Aristotle 2152, 2190 (Jonathan Barnes ed., Princeton Univ. Press 1984) (c. 384 B.C.E.).

175. The question of how to interpret a contract is answered differently when it is approached through the principles of Aristotle's rhetoric as opposed to his ethics. In *Rhetoric*, we are taught how to interpret the contract in light of whether the interpretation tells for or against us; in *Ethics*, we are taught to interpret the contract in light of which interpretation secures the higher good.

176. *See* Aristotle, *supra* note 174, at 2192.

177. *Id.*

> as a whole is a sort of contract, so that any one who disregards or repudiates any contract is repudiating the law itself. Further, most business relations—those, namely, that are voluntary—are regulated by contracts, and if these lose their binding force, human intercourse ceases to exist.[178]

If, however, the contract tells *against* us and for our opponents, Aristotle offers a different set of arguments:

> [W]e may argue that the duty of the judge as umpire is to decide what is just, and therefore he must ask where justice lies, and not what this or that document means. . . . Moreover, we must see if the contract contravenes either universal law or any written law of our own or another country; and also if it contradicts any other previous or subsequent contract; arguing that the subsequent is the binding contract, or else that the previous one was right and the subsequent one fraudulent—*whichever way suits us.*[179]

In Gary's case, the prenuptial agreement certainly tells *for* him. That is precisely what his lawyer drafted it to do. Under Texas state law and the Uniform Premarital Agreement Act, a prenuptial agreement, unlike commercial agreements, will be enforced unless there is a finding of involuntariness *or* of *both* unconscionability *and* a failure of disclosure.[180] The question is how to understand what Gary does next. According to Aristotle's *Nicomachean Ethics*, the equitable person "does not stand on his rights in a bad way, but tends to accept less than his share, though he has law on his side."[181] According to his *Rhetoric*, every dispute relating to the application of laws or the enforcement of contracts is subject to a predictable series of arguments and counterarguments, depending on whether the law or contract tells for or against us.[182] To reconcile these two positions, we can posit that the equitable person refrains from asserting readily available arguments to "stand on his rights in a bad way," even when the result of such restraint cuts against his interests. He does not take advantage of the law to advance his own interests at the

178. *Id.*

179. *Id.* (emphasis added).

180. TEX. FAM. CODE ANN. § 4.006 (West 2013); see *infra* note 216 and accompanying text for relevant discussion of the Uniform Premarital Agreement Act. As Professors Atwood and Bix observe, "unconscionability by itself is *not* a basis for voiding an agreement; the challenger must also show a failure of financial disclosure. In that regard, the UPAA makes premarital agreements *harder* to invalidate than commercial agreements, since unconscionability is a complete defense in the commercial world." Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital & Marital Agreements*, 46 FAM. L.Q. 313, 322 (2012) (footnotes omitted). I am grateful to Professor Brian H. Bix, Reporter for the Drafting Committee on Uniform Premarital and Marital Agreements Act ("UPMAA") representing the National Conference of Commissioners on Uniform State Laws, for underscoring this two-fold requirement.

181. *See* ARISTOTLE, *supra* note 155, at 101.

182. *See* ARISTOTLE, *supra* note 174, at 2192.

expense of what a reasonable legislator would determine to be just. Indeed, although the art of rhetoric uncovers the ever-present possibility of proving opposites and instructs on how to perfect the practice of doing so, Aristotle's account of the equitable person suggests that the equitable person would not avail himself of this art to advance his own self-interest at the expense of another party or the higher good. To be sure, whether or not Gary is an equitable person is not the question the court must answer. The court must determine whether Caroline's agreement to sign the contract was voluntary. However, Gary's character as reflected by his actions—not only in securing Caroline's signature, but also in the terms he incorporates into the contract and the arguments he advances to persuade the court to enforce these terms—are perhaps strong evidence that he got what he deserved. This is precisely because at every stage, Gary's only objective was to "stand on his rights in a bad way."

Take for instance his claim that Caroline signed the prenup voluntarily.[183] Given the pattern of deceit and manipulation through which Gary obtained her signature, it seems an incredible argument to front. But Gary digs deep. There are cases, he argues, that tell in his favor—cases in which the court found involuntariness due to forms of coercion much more egregious than the tragicomic hide-the-prenup game he played to protect his accumulated wealth from disclosure and potential division.[184] After all, Gary never screamed at Caroline to make her sign the agreement.[185] He never threatened her with bodily injury if she did not sign.[186] He uses these precedents, not, one imagines, because he truly believes that voluntariness can be reduced to the absence of screaming and threats of bodily harm, but rather because these precedents *tell in his favor*. If the court were to accept these precedents as the standard of voluntariness, the cases would allow him to stand on the rights he secured through the prenup notwithstanding his deceit, because

183. *See* Brief of Appellant, *supra* note 111, at *7 ("Caroline signed the [prenup] voluntarily, happily, and without objection—no duress, coercion, or threat took her free will away.").

184. *See id.* at *17 (citing Myers v. Myers, No. 03-05-00231-CV, 2006 WL 3523792, at *2 (Tex. App. Dec. 8, 2006) (affirming a finding of involuntariness after husband screamed at wife and threatened her to sign a premarital agreement); Martin v. Martin, 287 S.W.3d 260, 265 (Tex. App. 2009) (finding evidence of involuntariness after husband threatened to financially devastate wife if she did not sign a premarital agreement); Izzo v. Izzo, No 03-09-00395-CV, 2010 WL 1930179, at * 3, 10–12 (Tex. App. May 14, 2010) (upholding a determination of an involuntary execution of a premarital agreement under "extreme and unreasonable pressure and duress")).

185. *See e.g.*, *Myers*, 2006 WL3523792, at *2 (explaining how husband threw agreement at wife and said she "had to sign"; "screamed" at wife for two hours before she signed the agreement; threats of bodily injury subsequently caused her to cross out provisions of the agreements); *see also* Brief of Appellant, *supra* note 111, at 17.

186. *See Myers*, 2006 WL3523792, at *2.

according to him, she signed it "of her own free will."[187] Although concededly she panicked when she read the prenup, she was not threatened with bodily injury, and "she was not under the influence of drugs or alcohol when she signed."[188] Caroline rebutted that she had been fraudulently induced to believe that her lawyer had said it was "okay to sign."[189] The court agreed.[190] But Gary's efforts to use the law to effectuate fraud was evidenced not only in the extra-contractual pattern of deceit directed at hiding the prenup from Caroline, nor was it limited to the specious arguments he conjured to defend the voluntariness of the prenup and secure its enforcement; instead, as the court went on to observe, his deceit was also evident in the terms of the prenup itself.

The court observed that Gary had attempted to preclude Caroline from making a showing of involuntariness "by including recitations in the very agreement that she alleges was not voluntarily signed."[191] In Gary's view, Caroline was precluded from claiming involuntariness, even as he, Gary, was shielded from the legal consequences that would ordinarily follow a finding that he had induced her to sign through deceit.[192] This was so, in his view, because the prenup included a recital in which both he and Caroline expressly acknowledged that they had given informed consent and that neither party was "*subjected to fraud*, duress or *overreaching*"; nor had either party "relied upon any representations, verbal or written, made by the other Party," nor had either of them been "pressured in any manner" to sign the prenup.[193]

By its express terms, the agreement purported to define the information each party relied upon in deciding to execute the agreement. By these terms, fraud could never be a basis for setting the prenup aside because each of the parties had attested within the terms of the contract that they had *not* been subjected to fraud, duress, or overreaching.[194] In

187. *See Martin*, 287 S.W.3d at 263 (defining "voluntary" as "an action that is taken intentionally or by the free exercise of one's will"); *see also* Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 696 (Tex. App. 2005) (citations omitted) (explaining that the term "voluntarily" under the Texas premarital agreement statute section 4.006 is derived from Texas common law concepts and has been construed as "an action . . . taken by design, intentionally, purposefully, by choice, of one's own accord, or by the free exercise of will").

188. *See* Brief of Appellant, *supra* note 111, at *17.

189. *See* Brief of Appellee, *supra* note 39, at 24–25.

190. The court noted the evidence of deceit, particularly the "direct false factual misrepresentation" that her attorney had said the final agreement was approved and okay to sign. Moore v. Moore, 383 S.W.3d 190, 197 (Tex. App. 2012).

191. *Id.*

192. Gary further argued that Caroline understood that she could not rely on the veracity of statements made that Hunt had read and approved the final draft because "[s]he was adverse to Gary in negotiating the [agreement] . . . ." Brief of Appellant, *supra* note 111, at *23.

193. Petition for Review, *supra* note 94, at Ex. E at 16.

194. *See id.*; *Moore*, 383 S.W.3d at 194–95 (explaining that Texas law generally favors premarital agreements); *see also* Beck v. Beck, 814 S.W.2d 745, 749 (Tex. 1991) (noting that

Gary's view, the effect of the prenup Barenblat drafted was that under its terms, Gary would enjoy impunity with respect to the misrepresentations and nondisclosures by which he *actually did in fact* induce Caroline to sign. Meanwhile, Caroline would be prevented from asserting fraud, "trick or artifice"—if she ever discovered it—as a defense against the prenup because she had voluntarily signed a contract in which she expressly averred that she had not been subjected to fraud, at a time when she did not know Gary had deceived her, but Gary did.

These recitals, however, were mere verbiage precisely because they were without foundation in the facts of what actually happened. The recitals supposed a world in which Caroline understood and executed the provisions of the prenup with full disclosure and the assistance of counsel. In this case, however, Caroline was deprived of the information necessary to understand the crucial terms and disclosures that were missing from the prenup, and therefore, the nature and scope of the rights she was waiving. Gary negotiated at arm's length—at best, while Caroline unwittingly negotiated on the basis of false beliefs grounded in her reliance of the truth of Gary's assertions and thus lacked the information necessary to assess her position. The trial court agreed with Caroline and found that her signing was, in fact, *involuntary*—a finding that the Texas Family Code expressly provided would void a prenup.[195]

Gary turned then to the appeals court. He argued there that Caroline's signing was voluntary because even if she had been lied to, and even *if* she *actually* relied on Barenblat's assertion that Hunt had approved the final version and had said it was "okay to sign," her reliance was not justifiable as a matter of law insofar as she knew quite well that Barenblat was not her attorney.[196] He also dug up a series of anti-reliance cases arising from the drilling leases of an oil and gas company

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public policy dictates that premarital agreements should be enforced); Larson v. Prigoff, No. 05-99-01755-CV, 2001 WL 13352, at *1 (Tex. App. Jan. 8, 2001) ("Texas law generally favors premarital agreements."); Grossman v. Grossman, 799 S.W.2d 511, 513 (Tex. App. 1990) (explaining the presumption that premarital agreements are valid). In Texas, courts have held that no fiduciary relationship exists between persons before they are married. *See* Schwarz v. Schwarz, No. 01-99-01365-CV, 2000 WL 1708518, at *4 (Tex. App. Nov. 16, 2000) (citing Marsh v. Marsh, 949 S.W.2d 734, 739–40 & n.4 (Tex. App. 1997)). *But cf.* Cannon v. Cannon, 865 A.2d 563, 582 (Md. 2005) (finding that a confidential relationship exists as a matter of law between a man and a woman in contemplation of an antenuptial agreement where marriage is its consideration).

195. *Moore*, 383 S.W.3d at 196–97; TEX. FAM. CODE ANN. § 4.006 (West 2013).

196. Gary argued that Caroline's express representations in the premarital agreement negated any purported reliance as the integration and waiver clauses in the agreement operated together to prevent her from asserting fraud as a defense. *See* Brief of Appellant, *supra* note 111, at *21 (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997) (finding that reliance waiver barred fraud in the inducement claim as agreement was duly negotiated, at arm's length by business savvy parties, represented by legal counsel, and waiver language was unambiguous)).

in one instance, and a dispute over a Rent-A-Center in another.[197] Gary argued generally from these commercial cases involving arm's-length transactions to support the notion that courts should construe prenuptial agreements according to the principles applicable to the construction of other contracts.[198] How sublime. In Gary's view, his wife's reliance on her future husband's good faith, fair dealing, and full candor in the presentation of a prenuptial agreement was equivalent to the sale of rights to excavate raw crude and collect debts owed on rented furniture between corporate entities.[199]

The appellate court, in a plenary review of the trial court's findings and all the evidence presented at trial, concluded that fraud led Caroline to sign the prenup.[200] Fraud was in the mix, or as the court termed it, Gary's "trick or artifice" prevented Caroline from "getting legal advice about the final draft of the prenup."[201] The Supreme Court of Texas thereafter denied Gary's petition for review and, approximately one month later, denied his motion for rehearing of the petition for review.[202]

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197. *Id.* (citing *Schlumberger Tech. Corp.*, 959 S.W.2d at 181; Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008); RAS Grp., Inc. v. Rent-A-Ctr. E., Inc., 335 S.W.3d 630, 640 (Tex. App. 2010)).

198. *Id.*

199. The courts shun this type of deceit even among corporate entities. See discussion of *ABRY*, *infra* at Part III. For a business management perspective, see ROSABETH MOSS KANTER, WHEN GIANTS LEARN TO DANCE: MASTERING THE CHALLENGE OF STRATEGY, MANAGEMENT, AND CAREERS IN THE 1990S 333–37 (1989) (discussing trust and mistrust in the American economic system and large corporations); *see also* ROSABETH MOSS KANTER, THE CHANGE MASTERS 283–89 (1983) (discussing the role of truth in business organizational models). Relatedly, and slightly different is the fairly common—but still curious—mindset of transactional attorneys and judges who view romance and marriage and business as eerily the same. For example, see the decision of Judge Francis G. Conrad framing his discussion of the validity, extent, priority of liens, and equitable subordination discussion in an adversary Chapter 7 bankruptcy proceeding with section headings titled: "The Credit Reference Tango" involving "The Groom" and "The First, Second, and Third Dancers." Midlantic Nat'l Bank N., N.A. v. Borg-Warner Acceptance Corp. (In re Mayo), 112 B.R. 607, 611, 618–18 (Bankr. D. Vt. 1990). *See also* Jack P. Jackson, *Recent Trends and Strategies in M&A Transactions*, 217 ANTITRUST COUNS. NL, Jan. 2013, at 1. In this piece on mergers and acquisitions, the author sees marriage and M&A contracts as parallel:

> In many ways, business combinations are like marriages. There is a courtship (due diligence period), an engagement (the M&A contract), the wedding (the M&A deal closes), and unfortunately, in many cases, a divorce (typically the M&A contract is executed but the transaction is not consummated). In viewing M&A lawyers as the business world's marriage and divorce lawyers, we need to be able to counsel our clients on existing trends, assisting them in not being blinded by "love" (also known as profits, real or imagined) and the need to plan for a divorce under certain circumstances. This was true yesterday (2011), it is true today in 2012 and will be true tomorrow (2013 and beyond).

Id.

200. Moore v. Moore, 383 S.W.3d 190, 197 (Tex. App. 2012).

201. *Id.* at 196–97.

202. *Id.*, *reh'g of petition for review denied*, 2013 Tex. LEXIS 428, at *1 (Tex. May 31, 2013).

This means that the Texas state courts, at three different levels of review, refused to enforce the prenup. This seems correct, if for no reason other than it resulted in the invalidation of a contract that was secured by a pattern of deceit, of which the whole purpose was to enable Gary to acquire and thereafter assert rights that Texas state law would not otherwise afford him. His efforts to secure these "rights" operated by deceit: not only the extra-contractual deception by which he "collaborated" with his attorney to get Caroline to sign the prenup, but also in the counterfactual averments included in the prenup notwithstanding the fact that Gary knew these recitations were false, but Caroline did not.[203] Indeed, Gary's effort to stand on these deceptively acquired rights was further evident in the impoverished understanding of "voluntariness" he wanted the court to apply. Thus, at every level, Gary's conduct reflects the conduct of what Aristotle would call an "inequitable person," insofar as the equitable person is defined as one "who does equitable things; he does not stand on his rights in a bad way, and tends to accept less than his share, though he has law on his side."[204]

Notwithstanding all of this, it is worth asking why the validity of the prenup would depend completely on the issue of voluntariness.[205] One can imagine issues more directly applicable to our common understanding of equity and what is equitable. For example, one imagines it would be more to the point for the court to assess the fairness of what Gary gave in exchange for the waiver of the rights and obligations that would otherwise apply under Texas state law, absent the prenup. It does appear that Gary argued the substantive fairness of the prenup. He argued, for example, that he had included terms in the prenup that demonstrated that the prenup was as much for her benefit as for his.[206] The prenup provided, among other things, that during the marriage, Caroline would receive a monthly stipend of $3,500 as "compensation" for

203. *See id.* at 193–94. Even if Gary did not know that Barenblat's assurances that Hunt had said it was "okay to sign" were false at the time he communicated them to Caroline, he certainly knew after Hunt testified at trial. *See id.* at 194. Thus, Gary's decision to appeal the trial court's invalidation of the prenup is yet another instance in which Gary chose to "stand on his rights in a bad way." *See* ARISTOTLE, *supra* note 155, at 101.

204. *See* ARISTOTLE, *supra* note 155, at 101.

205. As discussed *supra* in Part II.A, the Texas courts were bound by the structure of the Texas Family Code and the standard set by the Texas revised version of the UPAA. The courts did not focus on general fairness because the relevant statute does not allow invalidation on that basis, except in cases of *extreme* unfairness, and only when it is *combined with* a failure of disclosure. Instead the courts' overall analysis of the evidence of fraud comes in as a judicial supplement to the statutory defense of "involuntariness," as Gary narrowly frames that issue. The "direct false factual representation that Caroline's attorney had reviewed and approved the agreement and told her she could sign it," held all the water necessary to invalidate the agreement on the basis of the judicially supplemented common law concept of fraud. *Moore*, 383 S.W.3d at 197.

206. *See* Brief of Appellant, *supra* note 111, at *18–19.

her "various household and business" assistance.[207] Although interspousal support is an obligation incident to the legal status of marriage,[208] absent a prenup, courts have not historically, nor do they ordinarily interfere in the living standards of the married couple and their household, particularly in the absence of an express or implicit agreement to the contrary. For example, in the case of *McGuire v. McGuire*, the Supreme Court of Nebraska famously said (at least in the academic world): "The living standards of a family are a matter of concern to the household, and *not* for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf."[209] In this sense, then, it is true that, by specifying a monthly sum of $3,500, the prenup did give Caroline a contractual right to a sum certain otherwise unspecified under Texas marriage law. But the idea that this monthly stipend operates to her "benefit" requires that we discount or rather ignore the fact that this sum is *instead*, or in lieu, of a fifty percent division of Gary's earnings during the course of the marriage. Moreover, the monthly stipend appears very much as though Gary assessed and priced out the value of Caroline's services rendered, but most significantly, the prenup by its terms made his "contractual obligation" illusory, insofar as it expressly limited Gary's obligation to pay the stipend by declaring it binding *unless and until* Gary should determine that he or his business could no longer afford it.[210]

To be sure, the idea that marriage warrants a more equal distribution of the spouses' earnings during the course of the marriage does get some traction insofar as the prenup provided that, after the fifth year of marriage, Caroline would receive 20% of the net earnings of Gary's separate property, and further provided that upon divorce, Gary

207. Petition for Review, *supra* note 94, at Ex. E. at 12.

208. *See e.g.*, TEX. FAM. CODE § 2.501 (2013). In speaking of the marriage relationship, section 2.501 of the Texas Family Code, titled "Duty to Support," specifically provides that: "(a) [e]ach spouse has the duty to support the other spouse. (b) A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed." *Id.*

209. McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (emphasis added). This case involved a wealthy farmer with "a reputation for more than ordinary frugality" and his wife of more than thirty years, who sought to judicially compel her extraordinarily "frugal" husband to pay for items such as, indoor plumbing, new clothes for her, efficient heat in the 1929 Ford coupé, or tickets to a motion picture show. *Id.* at 337–38. Professor Mary Anne Case explains that the Nebraska and other American courts appear to have taken the position: "love [the] marriage or leave it." Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 229 (2011); *cf.* State v. Bickerton, 197 A.2d 539, 539 (Conn. Cir. Ct. 1963) (affirming husband's conviction for "neglecting or refusing to furnish reasonably necessary support to his wife" under applicable Connecticut General Statute § 53-304).

210. *See* Petition for Review, *supra* note 94, at Ex. E at 12.

would purchase a vehicle for Caroline not to exceed $20,000 in price.[211] These were among the "benefits" Gary argued that Caroline received as a result of signing the prenuptial agreement his lawyer drafted.[212] Still, it is clear that the prenup replaces the default division established by the state of Texas with a division that tells much more favorably in Gary's interests than in Caroline's interests.

The profound discrepancy between what Gary gave and what Gary tried to get out of the prenup fairly raises the question as to why none of the Texas courts that reviewed the case ever mentioned the substantive terms of the prenup as a basis for invalidating the prenup. From a perspective concerned with the proper relationship between tort and contract, on the one hand, and the public interest versus private order on the other, reducing the prenup's validity to a question of voluntariness does warrant some reflection as to whether the Texas courts got the right result, but by the wrong path. This is just to say that there remains a question as to whether voluntariness is a good enough standard by which to judge the fairness of prenuptial agreements. To examine the issues raised by this question, we need to take another look at Texas family law relating to marriage and divorce.

Texas follows a community system of marital property rights.[213] All property acquired during the marriage, other than property owned separately before the marriage or acquired during the marriage by gift, devise, or descent, is presumed community property shared by the union of the two.[214] Accordingly, the community estate generally is expected to grow, as "it begins at the marriage with nothing and ends at the dissolution of the marriage with everything, presumptively, of which the parties are possessed."[215] That is the default law governing the assets and liabilities of married persons in Texas.

In 1987, the Texas legislature adopted its own version of the Uniform Premarital Agreement Act ("UPAA").[216] The UPAA was approved by the National Conference of Commissioners on Uniform State Laws in

211. *Id.* at Ex. E, at 7–8, 13.

212. Brief of Appellant, *supra* note 111, at *18–19.

213. TEX. CONST. art. XVI, § 15.

214. *See id.*

215. TEX. CONST. ANN. art. XVI § 15 (2013) (Interpretive Commentary 1993).

216. TEX. FAM. CODE ANN. §§ 5.41–5.50 (Vernon 1993) (current version at TEX. FAM. CODE ANN. § 4.006 (West 2013) ("The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.")); TEX. REV. CIV. STAT. ANN. tit. 1, subt. B, ch.4, subch. A (2013); *see also* S.B. 893, 70th Leg., Reg. Sess., § 1, 1987 Tex. Gen. Laws 2530, 2530–33; Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 298–99 & n.153 (1997) (citing UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987) (tracing the formalities of the Texas statute and explaining the role of the Texas Constitution in premarital agreements)).

1983 and has since been adopted by a significant number of states.[217] The Act adopts the "modern" view that deems prenuptial agreements generally enforceable.[218] "Section 6 is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable."[219] As discussed, an agreement is not enforceable if it was not signed voluntarily, or it was unconscionable and there is a failure of disclosure.[220] Tracking similar language from the Uniform Commercial Code, Section 6(c) of the Act states that unconscionability is a question for the court, not the jury.[221]

A significant number of the twenty-six states that have adopted the UPAA have developed local tests demanding procedural and substantive fairness for the enforceability of the prenuptial agreement.[222] As might be imagined, the analysis of procedural and substantive fairness is often interrelated. The UPAA's comment to Section 6 sheds some light on the meaning of unconscionability as including "protection against one-sidedness, oppression, or unfair surprise."[223]

In reviewing a prenuptial agreement, courts agree that the judge's role is not to substitute his or her sense of what is right for the parties.[224] With that said, unfair terms in the agreement sound an alarm of possible unfairness in the procuring of the agreement, and courts tend to pay closer attention to the circumstances surrounding the formation of the

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217. *See* Belcher & Pomeroy, *supra* note 97, at 56.

218. *See* 30 CAUSES OF ACTION 2d 155 § 6 (2006) ("The [UPAA] embraces the 'modern' view that deems antenuptial agreements generally enforceable.").

219. UNIF. PREMARITAL AGREEMENT ACT, prefatory note.

220. *Id.* § 6(a).

221. *Compare id.* § 6(c) ("An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.") *with* U.C.C. § 2-302(1) (1995) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . .").

222. *See* Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIMONIAL L. 1, 18, 29 & nn.85–87, 147–49 (1992) (text and accompanying notes citing state laws). "[A]mong the states that have adopted the UPAA, many have diverged from the black letter in significant respects—primarily to strengthen the procedural and substantive fairness requirements for enforceability. A recent study concluded that only thirteen states had enacted the UPAA with essentially no changes." Atwood & Bix, *supra* note 180, at 314–15; *see Premarital Agreement Act: Enactment Status Map*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Premarital%20Agreement%20Act (last visited Feb. 10, 2014). In February, 2013, a West Virginia Legislature delegate proposed adopting the UPAA in that state. H.B. 2089, 80th Leg. (W.Va. 2013).

223. *See* UNIF. PREMARITAL AGREEMENT ACT § 6 cmt. ("The test of 'unconscionability' is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) . . . ."). The comment also notes its reliance on commercial law principles protecting against "onesidedness, oppression, or unfair surprise." *Id.* (citing U.C.C. § 2-302(1) (1995)). *See also* Atwood & Bix, *supra* note 180, at 322 n.54.

224. Younger, *supra* note 222, at 27 & n.136. Although this "update" is now somewhat stale, the generalizations and analysis made still ring true.

agreement in these cases, determining whether the "amorphous concept" of substantive fairness has been met on a case-by-case basis.[225] Under the rubric of substantive unfairness, courts read agreements for "reasonableness in the circumstances" and seek to ensure that such agreements are not "so outrageous as to come within the unconscionability principles as developed in commercial contract law" and are "fair and equitable."[226]

The most dramatic change to previous Texas law was the shifting of the burden of proof, in either involuntariness or unconscionability and a failure of disclosure, from the party seeking to enforce a prenuptial agreement—who previously had to show that the other party gave "informed consent"—to the party challenging the agreement.[227] In addition, Section 4.006(a) of the Texas Family Code eliminated all common-law defenses to prenuptial agreements, with the exception of involuntariness and unconscionability.[228]

The original 1987 version of the Texas statute, like the UPAA, contained only subsections (a) and (b) of the Act.[229] However, in 1993, apparently in response to the 1991 decision in *Daniel v. Daniel*, which allowed both statutory defenses *and* common-law defenses to be asserted pursuant to the Family Code,[230] the Texas legislature expressly provided that the statutory defenses were exclusive, specifically exclud-

225. *Id.* at 27–28 (quoting Button v. Button, 388 N.W.2d 546, 551 (Wis. 1986)).

226. *Id.* at 28 (citations omitted).

227. *See* Featherston & Douthitt, *supra* note 216, at 300.

228. Section 4.006 of the Texas Family Code provides:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

TEX. FAM. CODE ANN. § 4.006 (West 2013).

229. *See* Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 694 (Tex. App. 2005) (citing S.B. 893, 70th Leg., Reg. Sess. § 1, 1987 Tex. Gen. Laws 2530–33).

230. 779 S.W.2d 110, 114 (Tex. Ct. App. 1989).

ing common-law defenses.[231] As this legislative history is explained by the *Sheshunoff* decision, the *Daniel* Court found that

> [A]bsent explicit legislative provision to the contrary, the involuntary execution and unconscionability defenses should be construed to "simply provide[ ] an additional statutory remedy for persons challenging property agreements executed pursuant to the Family Code" and not "to replace all common law defenses." . . . Thus, the *Daniel* court concluded that parties could assert *both* the statutory defenses under section 4.105 *and* common-law contractual defenses against the enforcement of partition and exchange agreements. . . . In subsection (c), the legislature supplied the explicit legislative intent found lacking by the *Daniel* court, providing that the "remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses."[232]

As a result, for prenuptial agreements entered into on or after September 1, 1993, the statutory defenses were exclusive.[233] With that said, the *Sheshunoff* Court gave meaning and effect to the "voluntarily" defense provided in the Texas statute by resorting to the official comments of the Uniform Act and to "common-law concepts including duress, . . . fraud, and undue influence."[234] Other appellate courts, including the *Moore* Court, followed in tow.[235]

The subsuming of other defenses such as fraud, misrepresentation, duress, and coercion into the now-exclusive statutory defense of "involuntariness" raised an interesting pleading and proving conundrum in Texas family law practice. If the only defenses to a prenup under Texas

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231. *See Sheshunoff*, 172 S.W.3d at 694–95 (citing H.B. 1274, 73d Leg., Reg. Sess., §§ 1–2, 1993 Tex. Gen. Laws 283).

232. *Id.* at 694–95 (citations omitted).

233. H.B. 1274, 73d Leg., Reg. Sess., 1993 Tex. Gen. Laws 283. As observed by Professor Thomas M. Featherston, Jr, and Amy E. Douthitt:

> Apart from unconscionability and involuntariness, traditional common-law contract defenses do not apply to premarital agreements. Section 5.46(c), which provides that the defenses in section 5.46 are exclusive, eliminates the common-law defenses for premarital agreements executed on or after September 1, 1993. However, they still appear to be incorporated into the concepts of involuntariness or unconscionability.

Featherston & Douthitt, *supra* note 216, at 301.

234. *Sheshunoff*, 172 S.W.3d at 695.

235. *See e.g.*, Moore v. Moore, 383 S.W.3d 190, 195 (Tex. App. 2012) ("Evidence of fraud and duress may also provide proof of involuntariness. . . . However, fraud and duress are not themselves defenses to a premarital agreement." (citation omitted)); Sanders v. Sanders, 02-08-0021-CV, 2010 WL 4056196 (Tex. App. Oct. 14, 2010) (involving post-nuptial agreements and mental capacity); Martin v. Martin, 287 S.W.3d 260, 263 (Tex. App. 2009) ("[W]hether a party executed an agreement voluntarily or as the result of a state of duress or coercion is a question of fact dependent upon all the circumstances and the mental effect on the party claiming involuntary execution." (citations omitted)). However, the *Martin* Court specifically noted that common law defenses would be available to the parties because the marital property agreement at issue had been entered into prior to the September 1, 1993 enactment. *Martin*, 287 S.W.3d at 263.

law are statutory—and if these statutory defenses are further limited to involuntariness or unconscionability and a failure to disclose—then circumstances involving fraud in the inducement must fit the doctrinal framework of one or the other in order for a court to void an agreement.[236] That would explain why Gary crafted his arguments and why the Texas courts developed their analysis around an interpretation of voluntariness, but it still begs the question whether voluntariness is adequate for purposes of protecting both the parties and the public against the injuries caused by lies and deception.

Is it fair to rely on voluntariness to prevent injustice when there are dramatic disparities of position and power among the parties to a contract? As revealed by the financial disclosures, there was a significant disparity between the parties in terms of resources and information, and Gary, like many who are keen to stand on—and expand the scope of—their rights, certainly used his superior resources and access to information in this case to dispossess Caroline of the rights her marriage to him would otherwise have conferred on her. In declaring voluntariness the only requirement for a valid prenuptial agreement,[237] the state reduces the marital relation to a mere contract—at least with respect to those would-be spouses who are savvy or cynical enough to avail themselves of the freedom to craft their own private order. Gary did and did so quite explicitly. In formulating his arguments to enforce the anti-reliance provision grounded on false recitals of fact, he turned to cases involving contractual arrangements between oil companies, seeking to draw a parallel between his marriage to Caroline and such business dealings in order to justify depriving her of a remedy for fraud in the inducement.[238]

Should the state defer completely to the freedom of contract, or is fairness between the spouses an important value to uphold given the nature of the marital relation? Specifically, should the state police not only voluntariness but also the fairness of the contract regardless of what the power dynamics within the relationship may drive the spouses to agree to between themselves, particularly given the significant risk of unjust enrichment and detrimental reliance afforded by the marital relation? This interesting question is not considered by the Texas courts, which did not rescind the contract on the basis of the unfairness of the prenup (that is, Gary's dispossession of Caroline), but only determined that deceit made the prenup involuntary.[239] But the problem was eventually recognized.

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236. This was one of the primary arguments raised by Gary in his unsuccessful petition to the Texas Supreme Court. *See* Petition for Review, *supra* note 94, at 7–12.

237. *See Moore*, 383 S.W.3d at 194–95.

238. *See supra* notes 196–97 and accompanying text.

239. For discussion of the pivot the Texas court makes in order to cast or supplement the

The Texas Family Code's modifications of the UPAA and its application by the courts, created an ongoing problem of uncertainty regarding the applicable doctrines bearing on the enforceability of prenuptial agreements—and specifically on the question of the availability of equity.[240] In response to this uncertainty surfacing in Texas and elsewhere, and following two years of drafting, the Uniform Law Commission ("ULC") adopted the Uniform Premarital and Marital Agreements Act ("UPMAA") at its 2012 annual meeting.[241] The UPMAA drafters intended to resolve the courts' varied interpretation of the defenses recognized under the UPAA by offering this new uniform family law and estate planning law designed for the twenty-first century.[242] Section 5 of the UPMAA specifically directs that principles of law and equity operate to "supplement" the Act.[243] Notwithstanding the Act's broad standards for enforceability for prenuptial agreements, courts may supplement their interpretation of the provisions of a prenup by reference to traditional contract and equitable doctrines, such as misrepresentation, fraud, undue influence, unjust enrichment, or other traditional defenses.[244] The UPMAA Drafting Committee was particularly concerned about the extent to which the UPAA regime enabled premarital agreements to effectuate the waiver of significant future benefits conferred by state marriage laws by vulnerable and unwitting prospective spouses without

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meaning of the Texas Family Code's undefined defense—"involuntary"—to include common law fraud, see *supra* note 235 & accompanying text.

240. *See* Atwood & Bix, *supra* note 180, at 338 n.147 ("In Texas, for example, courts have held that fraud and duress are not themselves defenses to enforcement of a premarital agreement, on the theory that the UPAA's enumerated defenses were intended to be exclusive." (citing Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 697–98 (Tex. App. 2005))).

241. As explained by the Chair and Reporter of the Drafting Committee respectively, Professors Atwood and Bix write:

> As with almost all uniform laws, the project began with the formation of a Study Committee, appointed in the spring of 2009 on the recommendation of the Joint Editorial Boards for Family Law and Trusts and Estates. That recommendation, authored by Commissioners Harry Tindall of Texas and Sheldon Kurtz of Iowa, emphasized the uncertain enforceability of premarital and marital agreements across the United States. It noted that the law governing premarital and marital agreements varied significantly from state to state and that, within a single state premarital and marital agreements might be governed by different standards of enforceability.

Atwood & Bix, *supra* note 180, at 328.

242. This Uniform Act is designed to address agreements altering the default rules applying to marriage and applies the same standards for enforceability of agreements entered into prior to and during the marriage. *See id.* For a recent and authoritative review of the considerations taken during the drafting process of the UPMAA, see generally Atwood & Bix, *supra* note 180.

243. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 5 (2012), *available at* http://www.uniformlaws.org/shared/docs/premarital and marital agreements/2012_pmaa_final.pdf ("Unless displaced by a provision of this [act], principles of law and equity supplement this [act].").

244. *Id.* § 5 cmt.

understanding the rights released.[245] As Section 5 of the UPMAA and its comment make clear:

> Because this act contains broad, amorphous defenses to enforcement like "voluntariness" and "unconscionability" (Section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to *make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them.* Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc.[246]

Viewed through the lens of narrative-in-reverse, the drama in *Moore* provides important lessons on the way lies and deception tear at the fabric of society—in this instance in the specific context of marital

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245. Professors Atwood and Bix provide the following insight:

> The Drafting Committee recognized that competing policies are at stake in any regulation of premarital and marital contracting. A state's default rules of marital property law and spousal support reflect basic policies about marriage and obligations of spouses. Premarital and marital contracting, in which individuals relinquish rights that would otherwise flow from marriage, may diverge from those policies, often dramatically. Persons who are about to marry or are in the throes of a rocky marriage may agree to waive significant future benefits without fully understanding or appreciating the nature of what they are waiving. The extent to which premarital contracts have disadvantaged women has been a particular concern.

Atwood & Bix, *supra* note 180, at 315 (footnotes omitted).

246. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 5 cmt. (italics added). The comment provides a specific example that generally tracks the facts of *Moore v. Moore*. According to the comment, "a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground." *Id.* (citing *In re* Marriage of Balcof, 47 Cal. Rptr. 3d 183, 190–196 (Cal. Ct. App. 2006) (marital agreement held unenforceable on the basis of undue influence); Bakos v. Bakos, 950 So. 2d 1257, 1259 (Fla. Dist. Ct. App. 2007) (affirming trial court conclusion that premarital agreement was voidable for undue influence)). In *Bakos*, the husband gave his would-be wife the following ultimatum: "Sign or no marriage," which he gave her within twenty-four hours of the wedding. *Bakos*, 950 So. 2d at 1259 (citing Lutgert v. Lutgert, 338 So. 2d 1111, 1114–16 (Fla. Dist. Ct. App. 1976) (affirming that circumstances such as first presenting the prenuptial agreement to Wife while at the jewelry shop buying rings and within twenty-four hours of the wedding were sufficiently coercive to give rise to a presumption of undue influence or overreaching)). Not so in Texas. Under current Texas law, proximity in the timing of signing the prenup to the marriage ceremony is absolutely immaterial to the agreement's enforceability and does not establish duress. *See e.g.*, Osorno v. Osorno, 76 S.W.3d 509, 511 (Tex. App. 2002) (signing twenty-four hours before the wedding insufficient to void prenuptial agreement even if bride-to-be was "forty, unmarried and pregnant"). As Jonathan Bates, Esq. explained, "the pregnant bride dressed in her wedding gown and presented with the prenup for the very first time at the altar who signs the agreement is unlikely to prevail on a complaint alleging that the timing of the signing amounts to duress." Telephone Interview with Jonathan Bates, Esq., Kinser & Bates (Dallas), Trial Counsel for Caroline Feherty (Nov. 14, 2013).

relations. Gary's conduct reflects the actions of a man who wanted more than his fair share of rights, and beyond this overreaching, wanted also to ensure that his future wife would have *no* (or relatively very few) rights against him. This is most poignantly evidenced in the illusory promise of maintenance that he tallied as a benefit to her even as he ensured that any obligation that might be understood to follow from his promise was completely at his discretion and lasted only *until and unless* he decided not to pay.[247] That a man who would insert such a deceptive promise into a prenuptial agreement would later, at the time of divorce, dig in to stand on his rights rather than do what is equitable is hardly surprising given the lengths of fraud and deception to which he was willing to go in crafting and securing Caroline's consent—in the first place—to the overreaching rights he was intent on enforcing.

At equity, courts were quite able to recognize fraud and adjudge it as a basis for denying a liar the assistance of judicial process to effectuate his fraud. However, as we saw in *Moore*, equity *per se* was not the legal framework through which the Texas courts resolved the dispute over Gary's fraudulent prenup.[248] Instead, the Texas courts looked to statutory law, specifically the statute Texas had enacted in adopting its variation of the UPAA.[249] The Texas statute replaced a preexisting legal framework in which the burden of proof was against enforceability of prenuptial agreements subject to an affirmative showing by the proponent that the other spouse gave informed consent with a new legal framework in which prenups were broadly enforceable absent proof of involuntariness by the prenup's opponent.[250] Thus involuntariness was a statutory defense that voided the prenuptial agreement, rather than an equitable determination that fraud in the inducement warranted rescission of the contract.

Still, it is important to note that in order to define the substantive meaning of involuntariness—to define it in a manner they deemed fair and correct—the Texas courts had to turn to precedent where none was adequate. In doing so, they rejected Gary's efforts to establish voluntari-

247. *See* Petition for Review, *supra* note 94, at Ex. E at 12.

248. *See supra* Part II.A.

249. *See id.*

250. *See* Featherston & Douthitt, *supra* note 216, at 300 ("Under prior law, a party seeking to enforce an agreement had the burden of proof to establish by clear and convincing evidence that the other party gave 'informed consent' and that the agreement was not obtained by fraud, duress, or overreaching. The new Act places the burden of proof on the party asserting the agreement's invalidity. The party opposing the agreement must now prove either (1) that the agreement was not entered into voluntarily or (2) that the agreement was unconscionable when it was executed and that before entering into the agreement the party was not provided with a fair and reasonable disclosure of the other party's financial situation, did not waive disclosure, and did not have adequate knowledge of such situation. In other words, a statutory presumption of validity exists.").

ness by reference to cases defining involuntariness in terms of physical coercion and psychological abuse.[251] Instead, the courts turned to venerable concepts of fraud—the "trick or artifice" that since time immemorial had warranted rescission at equity. This conception of fraud was in turn imported to define the limits of voluntariness and thereby to declare that Caroline's consent was not voluntary because it was extracted through deception.[252] The interpretive difficulty the Texas courts confronted in construing the meaning of voluntariness to achieve justice as between the parties was not limited to *Moore*. The cumulative experience with the UPAA, both in Texas and across other state jurisdictions that adopted it, ultimately animated the Uniform Law Commission's ("ULC") reinstating the defenses available at equity as a supplemental body of law under the newly promulgated uniform law, the UPMAA.[253]

From the experience in Texas, we can see that the law of prenuptial agreements has come full circle back to equity. Why? Because experience teaches that deceit is wrong and produces injury wherever a liar seeks to enforce the advantages extracted through deceit. This same experience also teaches that allowing a liar to enlist the law to enforce the benefit extracted on the basis of deceit produces injustice not only as between the parties, but also assaults the integrity of the very freedom the deceit seeks to leverage and exploit. In this case, it is the freedom to negotiate a prenuptial agreement that the liar abuses at the expense of the marital relation and, indeed, at the expense of the very idea of marriage itself. Thus, the ULC has seen fit to promulgate a new Act that would promote "basic elements of procedural fairness that the UPAA marginalized or omitted altogether."[254] The courts are once again to be called upon to step in and harmonize the freedom the state would like to afford to parties to establish their own private order with the superior imperative of protecting the public good against the consequences of wrongful actions. In the specific context of prenuptial agreements, this

251. *See* Moore v. Moore, 383 S.W.3d 190, 196–97 (Tex. App. 2012) (finding that the prenup was involuntary, even in the absence of physical coercion or psychological abuse).

252. *See id.*

253. Over the decades it has been in play the UPAA has garnered "a variety of criticisms . . . that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties." UNIFORM PREMARITAL & MARITAL AGREEMENTS ACT prefatory note (Draft for Conference Call, April 4, 2012), *available at* http://www.uniformlaws.org/shared/docs/upmaa/UPMAA_Draft_ConfCall_2012_04_04.pdf (citing *e.g.*, Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994); J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83 (2011)).

254. Atwood & Bix, *supra* note 180, at 344.

judicial duty amounts to reviewing prenups for fraud, duress, unjust enrichment, and other inequitable wrongs—not just for voluntariness.

III. *ABRY PARTNERS V, L.P. v. F & W ACQUISITION LLC*: THE INS AND OUTS OF LYING

From the inequities of deceit and manipulation in the context of marriage and divorce, I turn now to examine the treatment of fraud in the context of an agreement for the sale of a company executed by two sophisticated private equity firms. Although the social context has changed, the objective remains the same—to understand how the law treats the problem of deception at the intersection of tort and contract law and its implication for determining the relative priority of public interest versus private order. By finding the prenup unenforceable for reasons of involuntariness, the Texas state court in *Moore* in effect rescinded the contract in terms that cohere nicely with the theory underlying contract law insofar as involuntariness due to fraud negates the freedom of will which underlies the very essence of contract. In *ABRY Partners V, L.P. v. F & W Acquisition LLC*,[255] we see the problem of lies and deception dealt with in a different way—although we also can recognize the location of the problem and its judicial resolution at the same intersection of tort and contract law, as well as its similar implications for the relative priority of public interest over private order.

In an interesting article, Professors Goldberg and Zipursky object to what, in their view, has been an effort in law schools and the legal academy to characterize the law of torts as concerned with accidents and loss allocation, rather than with the idea of torts as civil wrongs.[256] According to the authors, Torts professors have "lost their grip" on the subject matter, insofar as they eschew the core of tort-wrongs-focused language as "dated, squishy, and inapt," opting instead for the more law-and-economics-oriented language of "cognitive biases" and "marginal utility."[257] The authors attribute this shift away from a "rights and wrongs" focus to an "allocation of losses" focus to a movement in the legal academy that begins with Holmes and continues through Prosser,[258]

255. 891 A.2d 1032 (Del. Ch. 2006).

256. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010); *see* Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 999 (2003) (examining court-created limits on comparative fault defenses based on normative considerations in tort law).

257. Goldberg & Zipursky, *supra* note 256, at 918–19.

258. *Id.* at 922 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941)).

Epstein,[259] Posner,[260] Atiyah,[261] and Calabresi.[262] Rather than following this movement, Goldberg and Zipursky backtrack and reclaim the Blackstonian conception of torts as the law of private wrongs.[263] The authors' objective is to help us find our way back to this understanding of torts, for as the authors variously repeat: "[T]ort law is about *wrongs*. The law of torts is a law of wrongs and recourse—what Blackstone called 'private wrongs.'"[264]

Although I appreciate and share the authors' concern to reclaim torts from law and economics and re-center issues of wrongness and rightness, I wish to supplement their excellent contribution by using *ABRY* to demonstrate why, in my view, the reclamation of tort law will require not only a renewed attention to matters of "private" wrongs, but a renewed emphasis on the priority of public interest over private order. As Professor Bublick has observed, "Law has an expressive function. It not only reflects, but also shapes norms."[265] This is particularly evident at the intersection of tort and contract law, where the private order established pursuant to the freedom of contract is subordinated to the public values at stake in dealing with the problem of contractual fraud. In *ABRY*, we see the Delaware Court of Chancery determine that lying justifies judicial intervention to ensure that public policy prevails over private order.[266] We see that this public policy includes an interest in

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259. *Id.* at 925 (citing Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151 (1973)).

260. *Id.* at 927 (citing Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972)).

261. *Id.* at 924 (citing P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (3d ed. 1980)).

262. *Id.* (citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970)).

263. *Id.* at 918.

264. *Id.* On the specific context of the tort of lying, Goldberg and Zipursky apply the thinking of H.L.A. Hart:

> The statement that it is wrong to lie, spoken by a parent to a child or written by an opinion columnist for newspaper readers, contains injunctive force: it condemns lying and conversely urges refraining from lying. Making such a statement is, moreover, identifying a way of treating other people as unacceptable. The same is true when a court holds liable a broker who has misrepresented a company's financial condition to an investor who relied on that misrepresentation to his detriment. The court is articulating a norm of conduct that requires certain actors to refrain from deceiving other[s] to their detriment and condemns doing so as wrongful. The first would be said to be a duty-imposing rule of morality, the second a duty-imposing rule of law.

Id. at 949.

265. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1463 (1999).

266. *See* ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1053 (Del. Ch. 2006).

providing judicial remedies for injuries caused by contractual fraud.[267] At the intersection of tort and contract law, *ABRY* tells in the direction of tort law. Moreover, in contrast to *Moore*, lying in *ABRY* is judged to be wrong for reasons that are not limited to its impact on the victim's free will or on the voluntariness of the consent extracted through the liar's fraud. It is also wrong to allow a liar to use the law to benefit from his lies, or to protect him from the obligation to repair the injury caused by his lies. Allowing such private injuries to go unremedied is not just an injustice to the victim, but, according to the Court of Chancery, it is also against public policy—separate and beyond whatever private injury the wrong, including a lie, may inflict on the party deceived.[268]

In *ABRY*, then-Vice Chancellor Leo E. Strine, Jr., of the Delaware Court of Chancery,[269] confronted an interconnected series of fascinating and provocative questions. Can parties order their affairs through a private contract that expressly reserves one party's right to lie about a material element of the contract? Can a contract that insulates one party, in this case the seller, from a rescission claim based on a false statement of fact made within the express terms of the contract, be enforced against the buyer when the seller does in fact make a false statement that induces the buyer to buy and was intended to do so? If a buyer, whether sophisticated or not, enters into such a contract and is unhappy with the results after the falseness of the seller's contractual representations are discovered, should the court uphold the contract? Why should a sophisticated equity firm be saved from the consequences of its own agreement if the right to lie is clearly an express term of the contract itself? To see the case in this way is to see that it raises—and exceeds—the question of promissory fraud. This is because the issue is not simply whether the court will allow a fraudster to stand on his rights under the terms of a contract secured by lies and deceit, but also and significantly whether the court will enforce a contractual term that appears to give a party the right to lie.[270]

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267. *Id.* at 1064.

268. *Id.*

269. *See id.* at 1034.

270. Perhaps a qualification is in order in discussing the so-called "right to lie" vis-à-vis an exculpatory provision in an agreement protecting a party against claims based on fraud or deceit. In the first instance, the proponent might argue that there is a positive right to lie, meaning that the clause imposes obligations on the other party to take affirmative action in such a manner so as to ensure the preservation of the other party's, well, right to lie. In the second instance, an exculpatory provision of this type is argued to ensure that the exculpated party can rely on this provision to protect it against claims of liability arising from fraud or deceit. It is unclear, at least from the victim's perspective, that the distinction is meaningful. The reference to a "right to lie" is an interpretation of the exculpatory clause, which has the same effect as recognizing a right to lie, at least from the perspective of the liar who gets to get away with his lies. In any event, Vice

Similar to the anti-reliance provision in *Moore*, the terms of the agreement in *ABRY* purported to define the information each signing party relied upon in deciding to execute the agreement.[271] In *ABRY*, the Delaware Court of Chancery reached into "a deep body of case law as well as leading treatises" to find that, even in a commercial context, "a provision in a bargain that fraud in its formation shall not be asserted is illegal."[272] Williston and Corbin agreed that complete and binding contracts are voidable for fraud, especially when a false representation of fact is embodied within the four corners of the contract itself.[273] The Court of Chancery followed Williston and Corbin, noting that "[t]his sort of reasoning draws in no small measure from the nostrum *fraus omnia corrumpit*—fraud vitiates everything it touches."[274]

A. *The Story*

In *ABRY*, a sophisticated private equity firm, ABRY Partners ("the Buyer") entered into a stock purchase agreement with another sophisticated private equity firm, Providence Equity Partners ("the Seller") to buy all of the shares of F&W Publications ("the Company"), a publishing company owned by the Seller.[275] The Company "publishe[d] special interest magazines and books both in the United States and internationally."[276] Its primary assets included the following magazines: *Popular Woodworking*, *Scuba Diving*, *Family Tree Magazine*, *Country's Best Log Homes*, and *Writer's Digest*.[277] The Buyer already owned several media companies and assessed the assets as worth acquiring under guidelines expressly communicated to the Seller.[278]

According to the amended complaint, when approached, the Buyer relying heavily on the Company's financial statements, communicated to the Seller that it was willing to buy the Company for approximately $480 million, a value arrived at by considering the company's free cash flow—its earnings before interest, taxes, depreciation, and amortization

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Chancellor Strine held that the seller could not insulate itself from liability for "its own conscious participation in the communication of lies." *Id.* at 1064.

271. *See id.* at 1041.

272. *Id.* at 1059 (brackets omitted) (quoting Restatement (Second) of Contracts § 195 (1981); Restatement (First) of Contracts § 573 (1932)).

273. *Id.* at 1056 n.49 (citing 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed. 1999); CORBIN ON CONTRACTS § 28.21).

274. *Id.* at 1059.

275. *Id.* at 1037.

276. *Id.* at 1036.

277. *Id.*

278. *Id.* at 1034, 1037.

("EBITDA").[279] The Buyer further alleged that because the Seller recognized that the Buyer was willing to pay ten times free cash flow, the Seller instructed the Company's management to persuade the Buyer that the Company had EBITDA of approximately $51 million.[280] The story, at least as alleged in the Buyer's amended complaint, is told as follows by the court.[281] The Seller allegedly knew that its Company was having cash flow problems and was desperate to dump the Company.[282] In order to paint a rosy picture in its courtship with the Buyer, the Seller and the Company allegedly cooked the books to generate financial statements that showed a free cash flow of $51 million for twelve months just before the closing of the sale.[283] This amount would warrant a sale price of $510 million.[284]

The rosy picture worked. The courtship ended at closing, with the Buyer assuming ownership of the Company for a negotiated purchase price of $500 million. Shortly thereafter, however, the Buyer "uncover[ed] a host of financial and operational problems."[285] These problems were apparently the kind that could only be discovered by actually running the Company and having access to all its data, equipment, and operations. In fact, the problems were so serious that the Buyer eventually concluded it had been defrauded, and promptly sued to set aside the Stock Purchase Agreement, seeking to return the Company to the Seller for the price purchased and damages for fraud.[286] The Buyer alleged that the Seller and the Company had conspired to "manipulate the Company's financial statements in order to fraudulently induce the Buyer into purchasing the Company at an excessive price."[287] Specifically, the Buyer claimed that it had discovered that three of the financial statements furnished just before closing "contained material

279. Amended Complaint at ¶¶ 34, 36, ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006) (No. 1756-N), 2005 WL 3935250.

280. *Id.* at ¶ 35.

281. The procedural posture of *ABRY* involved the Seller's motion to dismiss the complaint in its entirety. *Id.* at 1035. The court denied this motion, allowing the Buyer to proceed to trial to obtain its requested relief, rescission or alternatively, full compensatory damages, provided it met its burden of proof. *Id.* at 1064–65. Hence, these assertions are cast as mere allegations at this stage. *See id.* at 1045. By contrast, in *Moore*, the reviewing court reached its decision based on the findings of fact made and evidence presented at trial. Moore v. Moore, 383 S.W.3d 190, 192–94 (Tex. App. 2012).

282. *See ABRY Partners*, 891 A.2d at 1038.

283. *See id.*

284. The Buyer alleged that the Seller indicated to the Company "a desire to show the Buyer that the Company would generate EBITDA of approximately $51 million in that period, which would justify a purchase price of $510 million. The negotiations resulted in the Buyer agreeing to purchase all the stock of the Company for $500 million . . . ." *Id.*

285. *Id.*

286. *See id.* at 1040.

287. *Id.* at 1038.

misrepresentations of fact and did not accurately portray the Company's financial condition."[288]

The Buyer argued that a series of acts established the essential core of fraud, pointing to emails in the record to establish knowledge and intent.[289] For example, after taking possession of the Company, the Buyer claimed it discovered that the Company had overstated the Company's magazine revenues by "backstarting."[290] The Buyer further alleged that the Company had inflated newsstand revenues by using outdated estimates that reflected the Company's hoped-for sales, rather than its actual performance data.[291] The Buyer claimed that by overstating the value of obsolete inventory and uncollectible accounts receivable, the Seller created a false appearance of its net revenues, again inflating the Company's cash flow.[292] The Buyer accused the Company of using "channel stuffing," which inflated the Company's income.[293] This practice entailed counting sales of deeply discounted books to retailers, knowing all the time that a foreseeable number of these books would be returned and thus would not count as actual sales.[294] The Buyer further accused the Company of changing accounting methods just before closing in order to manipulate the reporting period for a subsidiary.[295] This trick allegedly enabled them to include the subsidiary's July income in its June revenue, while its June expenses were pushed forward to July, thus allegedly bloating the last available financial statements just prior to closing.[296] The Buyer argued that all of these maneuvers were intentionally designed to show strong end-of-quarter results for June, one week before closing.[297]

The Company also allegedly misrepresented the operational status of its book order fulfillment system, VISTA, by claiming it was fully functioning and processing orders when in fact orders were not only falling through, but VISTA had caused them to lose their account with

288. *Id.*

289. Amended Complaint, *supra* note 279, at ¶¶ 44–48.

290. Backstarting, at least as the term applies in *ABRY*, involves "inflating revenues by providing new magazine subscribers with back issues of a magazine when they receive their first issue under the subscription. This allows a publisher to report income earlier by using up more of a subscription in the first month." *ABRY Partners*, 891 A.2d at 1038; *see also* Amended Complaint, *supra* note 279, at ¶ 24 (setting forth the allegations in support of ABRY's fraudulent inducement claim specifically in connection with the year ended December 31, 2004 financial statements).

291. *ABRY Partners*, 891 A.2d at 1038.

292. *Id.* at 1038–39.

293. *Id.* at 1039.

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.*

Amazon.com—a materially adverse development that under the stock purchase agreement had to be disclosed—but was not.[298]

All of these alleged misrepresentations and omissions meant that the Company's value was grossly overstated by $100 million dollars.[299] According to the amended complaint, based on the Buyer's initial expression of intent to purchase a company at ten times its annual free cash flow, the Seller had reason to know the Buyer would never have purchased the Company for $500 million had it known that the Company was generating only $40 million per year.[300] The Buyer averred, that under the Buyer's expressly announced requirements, actual financials at $40 million would have meant a sale price of $400 million, not $500 million.[301] The Buyer argued that the Seller thus induced the Buyer to pay $100 million more than it had expressly stated it was willing to pay.[302]

In its amended complaint, the Buyer referenced a series of emails it claimed established that the Seller and the Company concealed the fraud from the Buyer.[303] Emails allegedly sent from the Company to the Seller allegedly included comments asserting that the actual numbers in the financial report were "worrisome," thus demonstrating actual knowledge that the value of the Company was less than the value represented to the Buyer.[304] Other emails referenced in the pleading allegedly reported activities just after the agreement had been signed and in preparation for the closing, asserting that the Company had "slipped into panic mode" trying to establish these earnings.[305] The Company's Chief Financial Officer Mark Arnett allegedly emailed the Chief Executive Officer Stephen Kent "that he would come to the office . . . to 'purge some things'" in advance of the due diligence call with PriceWaterhouseCoopers.[306] Kent, in turn, allegedly instructed Company managers to ensure that "employees were not permitted to meet with anyone from ABRY 'without a chaperone'";[307] no employee was to speak candidly and at all times were to "carry the flag" about the Company and be in "sell mode";[308] and employees were not to give "candid answers" about the

298. *Id.* at 1039–40.

299. *See id.* at 1040.

300. *See* Amended Complaint, *supra* note 279, at ¶¶ 1–3.

301. *See ABRY Partners*, 891 A.2d at 1040; *see also* Amended Complaint, *supra* note 279, at ¶ 54 (alleging that more than 20% of that EBITDA, at least $10 million, was fictitious).

302. *See ABRY Partners*, 891 A.2d at 1040.

303. Amended Complaint, *supra* note 279, at ¶¶ 4, 57.

304. *Id.* at ¶ 48.

305. *Id.* at ¶¶ 44–46.

306. *Id.* at ¶ 59.

307. *Id.* at ¶ 57.

308. *Id.*

Company's financial status.[309] In addition, the Buyer alleged that the Company reprimanded any employee who spoke candidly to ABRY about any difficulties at the Company.[310]

B. *The Buyer's Legal Demand*

The Buyer's lawsuit was a demand for rescission of the sale based on fraudulent inducement, as a result of financial manipulation and non-disclosure of material facts, or alternatively, for compensatory damages.[311] Having been allegedly lied to about the fundamental thing purchased—a company valued at $500 million on the basis of a false representation that it had a nearly $50 million revenue stream rather than the $40 million stream it actually had—the Buyer's demand was simple: Take your lousy company and give me back my money.[312] This is the remedy the Buyer wanted from the Delaware Court of Chancery, and given the alleged lying and cheating that was all over the map, it would seem a no-brainer—except perhaps in a world full of bullshit. From this perspective, it is easy to see that the court's response to the Buyer's legal demand is significant for reasons that far exceed the significance of this particular case—regardless of how obviously significant it may be to the Buyer.

In a world full of bullshit, no one has the right to rely on the truth of anything anyone else asserts or promises because the understanding is that everyone is bullshitting. Whether we live in a world full of bullshit depends at least to an appreciable extent on the way courts deal with these kinds of claims. In this case, the Delaware Court of Chancery had to take up this challenge in the face of the same competing concerns and legal frameworks that confronted the Texas state courts in *Moore v.*

309. *Id.*

310. *See id.*

311. ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1040 (Del. Ch. 2006). It is difficult to overstate the significance of fraudulent financials. A company cannot be inspected without true and correct financial statements. Without such statements, there is no "there there." You cannot buy it "as is" without knowing what it is. And what "it" is is the financial statements. *See e.g.*, JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 254 (1975) ("'We're doing this acquisition, but I've made a deal with the seller that he will only give us *one* representation. Which do you want?' Appropriately forewarned and forearmed, I blurt out my answer with no hesitation: 'The financial statements, of course.' And I think most acquisition lawyers would agree that this is the key warranty . . . ."). "There's no there there" is a colloquial expression that refers to situations involving an empty reference. The first "there" refers to that which is being referred to. The second "there" refers to the absence discovered when the referent is examined and determined not to be the first "there" suggested it was. In this specific instance, the first "there" is a reference to the Company, the second is to the discovery that an inspection of the financials would reveal in showing that the Company actually purchased was not the Company referred to in the first "there."

312. *See ABRY Partners*, 891 A.2d at 1040.

Moore: the tension between the common law's traditional interest in enabling the will of the parties through the enforcement of private contracts and equity's equally important interest in ensuring that the parties' dealings reflect the fundamental values of a civil and equitable society.

C. *A Not-So Complicated Agreement—Once You Understand the Fraud*

The contract executed by the parties had a series of provisions, some of which could be called pro-Buyer, while others tended to favor the Seller. Under the logic of freedom of contract, courts maximize civil freedom by giving effect to the private order established by the terms of agreements struck by the parties among themselves, rather than imposing an external will dictated by a centralized state. On a surface reading, the fact that certain provisions of the agreement appeared to benefit the Buyer while others appeared to benefit the Seller would tend to support the Seller's claim that rescission was improper because the Agreement had resulted from the give-and-take of full and transparent negotiations among equals. Indeed, the Seller made essentially three central arguments in support of enforcement and against rescission. It argued that the agreement was not a boilerplate contract.[313] Every word had been carefully chosen and negotiated by top-notch, expensive lawyers.[314] The Seller further argued that the Buyer expressly and knowingly waived its right to seek rescission.[315] And lastly, the Buyer was a sophisticated business with experience buying, selling, and operating media companies.[316] It knew what it was getting and what it was giving up in exchange for the agreed upon price, so there was no reason for the court to step in and let the Buyer out of a deal it had freely negotiated.[317] Why should the court step in to save the Buyer from the consequences of an agreement the Buyer freely agreed to—thereby depriving the Seller of the benefit of the bargain and undermining the regime of private ordering maintained through the enforcement of contracts? On the other hand, why should the court allow the Seller to profit from its alleged fraud?

In order to resolve this dispute, the court turned to the Stock Purchase Agreement. Key provisions benefitting the Buyer included the following: Section 6.2(j), which promised that the Company would not

313. *Id.* at 1052.

314. *See id.*

315. *See id.* ("[T]he Buyer agreed to the Exclusive Remedy Provision stating that the only remedy that it had against the Seller for contractual misrepresentations was limited to a claim in arbitration for damages . . . .").

316. *Id.*

317. *See id.* ("The Seller contends that a deal between sophisticated parties with the free right to walk away is a deal, and the law of this State should honor it.").

alter, modify, or in any way "change its accounting methods" in anticipation of the closing; Section 7.10(a), which warranted that the financial statements for the period between signing and closing furnished to the Buyer were "true and correct" and "prepared in accordance with GAAP"; Section 8.2(h)(i), which established a contractual duty on the part of the Company and the Seller to disclose underlying facts constituting a "material adverse effect"; and Section 9.1(a), which operated as an indemnity clause, and stated in pertinent part,

> [T]he Selling Stockholder agrees that, after the Closing Date, the Acquiror and the Company . . . shall be indemnified and held harmless by the Selling Stockholder from and against, any and all claims, demands, suits, actions, causes of actions, losses, costs, damages, liabilities and out-of-pocket expenses incurred or paid . . . but specifically excluding consequential damages, lost profits, indirect damages, punitive damages and exemplary damages . . . to the extent such [d]amages . . . resulted from, in connection with, or by virtue of the facts or circumstances (i) which constitute an *inaccuracy, misrepresentation, breach of,* default in, or failure to perform any of the *representations, warranties or covenants* given or made by the *Company* or the *Selling Stockholder* in this Agreement . . .[318]

While these indemnification provisions appeared to be for the Buyer's benefit, other provisions favored the Seller. Indeed, according to the Seller, the contract expressly limited the Seller's liability, even for intentional misrepresentations, and specifically barred any claim for rescission by the Buyer based on contractual misrepresentation.[319] This claim was grounded on a combined reading of two provisions we can refer to as "the anti-reliance provision" and the "as-is provision."[320]

The anti-reliance provision appeared in Section 7.8. This provision set out the Buyer's acknowledgement and agreement that the Company and Seller had made no warranties or representations, except those in the agreement.[321] According to the Seller's reading of this provision, the only representations upon which the Buyer could pray for relief were to be found in the text of the agreement itself:

> Acquiror acknowledges and agrees that neither the Company nor the Selling Stockholder has made any representation or warranty, expressed or implied, as to the Company or any Company Subsidiary or as to the accuracy or completeness of any information regarding the Company or any Company Subsidiary furnished or made available to Acquiror and its representatives, except as expressly set forth

318. *Id.* at 1042–44.

319. *See id.* at 1052.

320. *Id.* at 1041, 1043 (quoting §§ 3.23, 7.8 of the Stock Purchase Agreement). Section 7.8 discusses the anti-reliance provision, and Section 3.23 refers to the "as-is" provision.

321. *Id.* at 1041.

> in this Agreement . . . and neither the Company nor the Selling Stockholder shall have or be subject to any liability to Acquiror . . . [for damages from] use of or reliance on, any such information or any information, documents or material made available to Acquiror in any "data rooms," "virtual data rooms," management presentations or in any other form in expectation of, or in connection with, the transactions contemplated hereby.[322]

This anti-reliance provision was further buttressed by Section 3.23's "as-is, where-is" provision pursuant to which the Seller disclaimed liability for any representations or warranties not expressly included in the contract, and the Buyer agreed to take the company subject to these disclaimers. Section 3.23 stated,

> Except as expressly set forth in this *Article III*, the Company makes no representation or warranty, expressed or implied, at law or in equity in respect of the Company or the Company subsidiaries, or any of their respective assets, liabilities or operations, including with respect to merchantability or fitness for any particular purpose, and any such *other representations or warranties are hereby expressly disclaimed.* Acquiror hereby acknowledges and agrees that, except to the extent specifically set forth in this *Article III,* the Acquiror is acquiring the company *on an "as is, where is" basis.* The disclosure of any matter or item in any schedule hereto shall not be deemed to constitute an acknowledgement that any such matter is required to be disclosed.[323]

The essence of these two provisions is that the Buyer agreed that the only representations upon which the Buyer could rely and the Seller could be sued were the representations made in the contract itself. In other words, the Buyer agreed that it could not rely on nor sue the Seller for losses caused by acting in reliance on statements made outside the contract, such as sales pitches and puffing—the kind of utterances we might properly call bullshit. But the Seller's crown jewel provisions were in Section 9 of the Agreement. Operationally, Section 9 had three key parts. Section 9.1(a) articulated the Seller's promise to indemnify—a provision thus far tallied on the Buyer's side, but Section 9.1 also operated as a liability cap.[324] Section 9.1(c) limited the Seller's "aggregate liability for conduct covered by [Section] 9.1(a) to the amount of the escrowed Indemnity Fund, which was established . . . in [Section] 2.4(b)."[325] Section 9.1 purported to limit the Seller's exposure by capping damages—even those resulting from its own alleged fraud—at $20

322. *Id.*

323. *Id.* at 1042–43 (emphasis added). Highlighted is the specific language that distills this pledge.

324. *Id.* at 1043–44.

325. *Id.* at 1044.

million.[326] In addition to capping its liability, Section 9.9(a) purported to make the indemnity clause the Buyer's exclusive remedy—again, even for damages caused by the Seller's misrepresentations and deceit—while Section 9.9(b) underscored that the Exclusive Remedy and Indemnity provisions were not boilerplate.[327] Instead, it asserted that these provisions were specifically negotiated and reflected in the $500 million acquisition price, such that the price, it was argued, reflected the bargain struck.[328]

D. *The Court's Decision: Fraud Within the Contract Itself*

In considering the Buyer's plea that the court rescind the contract, based on public policy intervening to trump contractual freedom,[329] the court took on the "longstanding debate" in American jurisprudence—assessing society's interests in two competing sets of principles: freedom of contract rights versus "establishing universal minimum standards of truthful conduct for contracting parties."[330] Based on public policy, the court struck down the contract for two reasons: morality and efficiency. More specifically, the court found that the Buyer had pled fraudulent inducement with adequate particularity in alleging both that the Company's financials had been manipulated because they were neither true and correct nor prepared in accordance with GAAP, and the Seller's failure to disclose to the Buyer that problems with the Company's book fulfillment system had resulted in its termination by Amazon.com.[331] The road the court took amounts to a very significant case. No seller, not even in an arm's-length business transaction among sophisticated players in a market, can immunize itself from a rescission claim based on false representations of fact within the contract itself. The state's public policy will not tolerate a written contract that is predicated on false representations within the contract. That is the outcome,

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326. *Id.*

327. *Id.* Section 9.9(a) (the "Exclusive Remedy Provision") provides:

> Except as may be required to enforce post-closing covenants hereunder . . . after the Closing Date the indemnification rights in this *Article IX* are and shall be the sole and exclusive remedies of the Acquiror, the Acquiror Indemnified Persons, the Selling Stockholder, and the Company with respect to this Agreement and the Sale contemplated hereby; *provided* that this sentence shall not be deemed a waiver by any party of its right to seek specific performance or injunctive relief in the case of another party's failure to comply with the covenants made by such other party.

Id.

328. *Id.* ("[Section 9.9(b) clearly states that '[t]he provisions of *Article IX* were specifically bargained for and reflected in the amounts payable to the Selling Stockholder in connection with the Sale pursuant to *Article II*.").

329. *Id.* at 1055.

330. *Id.*

331. *See id.* at 1051–53.

but the way the court got there is as interesting as, and more significant than, the result.

First of all, the court affirmed its own authoritative role in establishing standards for "truthful conduct" in contracts. In a number of instances, Vice Chancellor Strine marks *ABRY* as different from other contract cases involving false representations. *ABRY*, he says, is "starker than the typical case."[332] *ABRY* involves a rescission claim based on "false representations of fact embodied within the four corners of the Stock Purchase Agreement."[333] The public policy concern driving the court's traditional abhorrence of fraud can be found even in cases where the fraudulent representations are made *outside* the agreement's four corners—for example, cases involving *oral* or *extra-contractual* misrepresentations. In Vice Chancellor Strine's view, *ABRY* raised a more difficult question precisely because the misrepresentations were *inside* the agreement itself. Thus, the case posed a complex question of first impression for the Delaware Court of Chancery:

> [T]o what extent may a contract exculpate a contracting party from a rescission or damages claim based on a false representation of fact made *within* the contract itself? May parties premise a contract on defined representations but promise in advance to accept a less-than-adequate remedy if one of them has been induced by lies about one of those material facts?[334]

The Court of Chancery granted the Buyer the opportunity to prove at trial the alleged fraud by invoking a number of age-old aphorisms and formulating a few new ones. For example, "fraud vitiates every contract, and no man may invoke the law to enforce his fraudulent acts."[335] And "a perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it."[336] Against this backdrop, the court's jurisprudential path to rescission took on a two-fold mission: (1) to demonstrate why, as a matter of public policy, a contractual provision that purports to prohibit the assertion of fraud in its formation is illegal; and (2) to demonstrate why, as a matter of contract interpretation, the court will not enforce a contract premised on fraudulent assertions contained within the contract itself.[337]

E. *Of Moral Wrongs and Public Interest*

The court's repudiation of the alleged fraud in the contract is in the

332. *Id.* at 1055.
333. *Id.* at 1056.
334. *Id.* at 1059 (emphasis added).
335. *Id.* at 1061 (quoting Slessinger v. Topkis, 40 A. 717, 718 (Del. Super. 1893)).
336. *Id.* (quoting Webster v. Palm Beach Ocean Realty Co., 139 A. 457, 460 (Del. Ch. 1927)).
337. *See id.* at 1059.

first instance a *moral objection* against allowing proven liars and "fraudsters" to avail themselves of the court's power and authority to enforce their frauds. The court concedes there is no reason to doubt that proven fraudsters will eventually pay the piper, for, as the Vice Chancellor observes,

> If the Seller . . . gets a rap as a fraudster who tries to sell portfolio companies based on false representations, that Seller will pay a price. . . . Having a bad reputation is likely to be costly, as buyers will tend to discount the value of the tainted seller's portfolio companies as a form of self-protection as well as to demand greater remedial flexibility in the sales contracts.[338]

And yet, the court declines to leave a fraudster's comeuppance to the invisible hand of the market.

According to the Delaware Court of Chancery, courts play an important role instilling the market with norms of fair play. There are both general categories and specific instances in which market correction offers neither adequate remedy for the victim nor proper punishment to the liar. In so determining, the Vice Chancellor invokes a societal interest in actively punishing fraudsters or, at minimum, denying them the cover of law. He says they endanger the public interest, but which interest remains vague and unspecified. He says the proven liar is of concern to our polity in general, but exactly how remains unclear.[339] He says, "[N]o man may invoke the law to enforce his fraudulent acts."[340] But if courts consistently refused to involve themselves in assessing the truthfulness of provisions in contracts involving unambiguous anti-reliance clauses, then provisions purporting to bar the buyer from raising fraud in the formation would send a clear message to the buyer: Just say no and do not sign. Yet, therein precisely lurks a serious problem—both in *ABRY* and in *Moore*.

To see the nature of the problem more clearly, we must again tap our socio-legal imagination this time to project an image of the kind of society—the character of the social bonds—most likely to emerge from a judicial practice of enforcing the terms of contractual frauds. To see this, we need first to see the essential sameness between *ABRY* and *Moore*. At a surface level, one might fail to see any ready similarity, as *ABRY* concerned an arm's-length market transaction between two fairly sophisticated private equity firms for the sale and purchase of a media company, while *Moore* concerned a prenuptial agreement relating to the

338. *Id.* at 1061.

339. *See id.*

340. *Id.* (citation omitted).

presumably non-market transactions of marriage and divorce. Despite these differences, *ABRY* and *Moore* share important similarities.

Both the Buyer in *ABRY* and Caroline Moore confronted agreements containing provisions that purported to waive their respective rights to sue in the event it were later discovered that the contract itself contained material misrepresentations. In *ABRY*, the Buyer argued that the warranties assuring the financials were true and correct were later discovered to be false statements of fact.[341] The Seller allegedly knew these statements were false, while the Buyer allegedly did not.[342] In *Moore*, the statement of fact contained in the recital stating that independent counsel had advised each of the parties prior to signing was also false.[343] Knowing this to be false, Gary nevertheless attempted to enlist three levels of the Texas state court system in attempting to hold Caroline to the agreement.[344] Caroline, on the other hand, sought to avoid the agreement because, through "trick and artifice" or fraud, she had been intentionally induced to believe that Hunt had reviewed and approved the prenup, though he had not.[345] Although both ABRY and Caroline could have refused to sign their respective contracts, the context in which each confronted this decision made it unlikely that either would view the provision as a reason not to sign—notwithstanding the degree to which either of them might have entertained the notion that fraudsters are deterred from fraud by the prospects of punishment by market corrections.[346] This is so for many reasons, but in each case, the court gave a different reason for refusing to enforce the waiver in light of the deceit proven in *Moore* and alleged in *ABRY*. In *Moore*, it was because the Texas state family court found that fraud rendered Caroline's waiver involuntary.[347] In *ABRY*, the Court of Chancery did something different.

The Court of Chancery looked to the context, not in order to assess voluntariness, but to determine whether there was an "overriding public policy" that warranted releasing the Buyer from the bargain it struck.[348] There is such a policy, said the court. It is the public policy against fraud. But said the Seller, the Buyer agreed to be bound by the terms of the contract. In seeking to avoid the liability cap, the Buyer has broken

341. *Id.* at 1038.

342. *Id.*

343. Moore v. Moore, 383 S.W.3d 190, 196 (Tex. App. 2012).

344. *See generally id.*

345. *Id.* at 197.

346. The court refers to ways commercial notions of fair play might be enforced outside the judicial system. "If the Seller, a private equity firm, gets a rap as a fraudster who tries to sell portfolio companies based on false representations, that Seller will pay a price." *ABRY Partners*, 891 A.2d at 1061.

347. *See Moore*, 383 S.W.3d at 197.

348. *ABRY Partners*, 891 A.2d at 1055.

its promise and made its word a worthless lie. That may be so, said the court,[349] but context matters.[350] In the context of this case, the reliance at issue does not relate to representations made outside the contract, though the court recites the Buyer's allegations of pre-contractual chicanery at length and in detail. The public policy at issue relates to misrepresentations of fact *within* the four corners of a contract—a policy that in effect makes the Buyer's reliance justifiable, notwithstanding the anti-reliance provision it agreed to, because the false statements of fact regarding the Company's financials were made *within*, rather than outside, the contract itself. In proceeding in this manner, the Court of Chancery conjures a series of concerns and observations that can in turn be read back onto *Moore* to assess whether these two cases, which ostensibly deal with very different issues by different courts in different states, nonetheless converge on a similar set of values and outcomes. These similarities, in my view, reflect the legal system's pushback against any temptation to minimize the significance of lies and deceit as mere bullshit.

Using the method of narrative-in-reverse, the question of justifiable reliance can best be cast as an analysis of the contexts and costs of practices that create and then betray social trust. The pre-closing negotiations referred to in the Buyer's amended complaint,[351] as well as the terms of the bargain reflected in the agreement,[352] certainly suggest reasons why the Buyer might have reasonably relied on the Seller's promises. The Buyer's amended complaint enumerated pre-closing maneuvers, machinations, and alleged deceitful tactics so ubiquitous as to induce a false sense of trust, financial well-being, and routine due diligence.[353] Though extra-contractual machinations alone could not, given the exclusive remedy provision, form the basis for allowing the Buyer to move forward to trial,[354] they do reveal a context that can easily explain how a reasonable Buyer could be induced, as a psychological matter, to sign a contract that purports to limit its remedial rights—even for fraud. Indeed, the detailed allegations presented in the Buyer's pleadings and repeated in the court's opinion recount a multitude of methods allegedly used by the Seller's managers to con the Buyer's key personnel into trusting the

349. *Id.* at 1058 ("To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners. . . . Put colloquially, this is necessarily a 'Double Liar' scenario.").

350. *Id.* at 1040 ("[I]t is important to place the Agreement in context.").

351. *See* Amended Complaint, *supra* note 279, at ¶¶ 44–48.

352. *See ABRY Partners*, 891 A.2d at 1040–45.

353. *See generally* Amended Complaint, *supra* note 279.

354. *ABRY Partners*, 891 A.2d at 1055.

closing certification.[355] The context reveals a drama of deception using structure, timing, and an understanding and anticipation of the victim's psychological state during the negotiations and at closing.[356] Knowing how to tap that vulnerability and use it to one's advantage is the art of being a fraudster.

Although the indemnification provision does not itself assert an affirmative misrepresentation, it does operate within the contract in a way that creates, even as it simultaneously betrays, social trust. The provision creates social trust insofar as it is what it appears to be: The Seller has agreed to serve as a direct obligor for the provisions certifying the accuracy of the representations and warranties in the agreement, including the accuracy of the financials. According to the Vice Chancellor, in Section 9.1(a), the Seller had "put its wallet behind the Company's representations and warranties to a defined extent."[357] The Seller's willingness to put up $20 million in indemnification is the kind of affirmative act that a reasonable Buyer could reasonably interpret as good evidence that the Seller meant what it said when it certified the Company's warranties that the Company's financial statements fairly represented in all material respects the financial condition of the Company and were prepared in accordance with GAAP.[358] But the social trust created by the Seller's certification and indemnification provisions is betrayed by the fact that, according to the allegations in the Buyer's amended complaint, the Company's warranted representations were not only absolutely and completely false, but knowingly and intentionally manipulated to appear true for purposes of closing the deal. From this perspective, it is the simultaneous creation and betrayal of social trust operating *within the contract itself* that triggers the public policy against fraud.

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355. *See supra* Part III.A.

356. For example, Vice Chancellor Strine, in recounting the bases for the alleged fraud, observes that a principal for the Seller, who subsequently signed the Officer's Certificate, allegedly wrote an email instructing the Company's CEO to manipulate the earnings. *ABRY Partners*, 891 A.2d at 1051. Specifically, Michael Dominguez, a principal of Providence, wrote the following email to the Company's CEO: "If Peggy of ABRY has it in her head that she is going to pay 10x [multiple of EBITDA], let's try to use part of the day to get her to the right EBITDA number. On an adjusted basis, it should be . . . north of $51 million." Amended Complaint, *supra* note 279, at ¶ 35 (brackets omitted). From this email it might be reasonable to conclude that the Seller (via its principal Dominguez) was affirmatively directing the Company (via its CEO) to manipulate his presentation of the earnings figures to ABRY so that ABRY would leave the meeting believing that the Company was going to reach $51 million in EBITDA.

357. *ABRY Partners*, 891 A.2d at 1043.

358. *Id.* at 1041–42, 1044. These representations were expressly backed by the Seller's specific representation in the Officer's Certificate, which stated "that the closing conditions relating to the accuracy of not only the Seller's, but the Company's, representations and warranties were satisfied, that the Company and Seller had complied with the covenants applicable to them, and also that the Company had not suffered events that had or would reasonably be expected to constitute an [material adverse effect]." *Id.* at 1043.

1. GETTING THE SELLER ON THE HOOK: THE OFFICER'S CERTIFICATE AND THE INDEMNIFICATION

The sheer bizarreness of the idea that an officer and principal of the Seller would knowingly *certify* fraudulent warranties and averments within the written terms of the contract certainly appears relevant to assessing the public interest at stake, for what kind of "market" do we imagine would emerge from a legal system where parties to a contract cannot rely on the representations certified at closing, as in an Officer's Certificate? To this, the Seller responds that of course the Buyer can rely on it. That is the whole idea, but by agreeing to the indemnification clause, the Buyer also agreed to a cap on the *extent* to which it could justifiably rely—that is, the Buyer knew that it could justifiably rely on the representations, but only to the tune of $20 million in potential damages. If it wanted greater security, it would have had to negotiate a different deal or perhaps take out some insurance, or whatever—according to the Seller.[359] But all other things being the same, is it reasonable to believe that a reasonable Buyer would understand the $20 million indemnification agreement as an agreement on its part to claim only $20 million in damages if it were later discovered that the Seller's contractual representations were knowingly falsified—to the tune of an unimaginable $100 million in fraudulent representations?

Quite the contrary, the context is such that a reasonable buyer would likely understand the $20 million indemnification agreement as the Seller's assurance that the warranties and averments included *no* substantial misrepresentations precisely because it was on the hook for up to $20 million. To hold otherwise would be to impose upon the Buyer the burden of protecting itself against an imagined fraud on the Seller's part so extensive and monumental that paying $20 million by way of the indemnification provision would still be worth it to the Seller. $20 million was, after all, a small price to pay for extracting $80 million more than the Buyer was willing to pay. Thus, if the court had denied the Buyer's justifiable reliance on the representations of fact made within the contract, it would have shifted to the Buyer a burden of imagining itself to be the victim of a fraud not covered by the warranties and more extensive than the promised indemnification.

But a Buyer, who imagines itself the victim of fraud on such grand a scale, would certainly not buy, and a rule that construes contractual obligations so as to require parties to imagine and protect against such scenarios is a rule that undermines the social trust without which there can be no freedom of contract. This is true because people do not con-

359. *See id.* at 1052.

tract when they think they are likely to be the victims of a fraud so humongous it is not even imaginable. From this perspective, enforcing the contract for the benefit of a fraudster not only undermines the public interest, but it destroys the contract itself as a mechanism of private ordering. Put differently, fraud within the contract abuses the freedom of contract to such an extent that it destroys the freedom of contract precisely because it destroys the social trust without which no contract—no exchange of promises based on justifiable reliance on the performance of a party—would be reasonable. And that quite interestingly turns the preservation of private ordering into a matter of public interest. The fraudster cannot use the law to advance its fraud not only because it defrauds the victims, but because it does so at the cost of destroying the law's suitability for the purposes for which it exists—and preserving the suitability of law is a matter of the highest public interest.

Once again, Aristotle can shed some light here on what we may mean when we talk about the "public interest." Public interest as opposed to "private interest" has, since Aristotle, been understood to mean something substantially more significant than a neighbor's curiosity in the affairs of his neighbors. Public interest has been formally defined in *Black's Law Dictionary* as "[s]omething in which the public as a whole has a stake; [especially], an interest that justifies governmental regulation."[360] Public, in turn, has been defined as "pertaining to a . . . whole community . . . or affecting the whole body of people."[361] The notion that persons might have an interest in the affairs of geographically distant others—on account of a common membership in a shared community—dates back, at least, to Aristotle. In Book I, Chapter 1 on *Politics*, Aristotle states,

> Every state is a community of some kind, and every community is established with a view to some good; everyone always acts in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.[362]

This understanding of the public interest provides a compelling justification for prioritizing public interest over private ordering. When the two

360. BLACK'S LAW DICTIONARY 1350 (9th ed. 2009); *see also* Goldberg v. Barger, 112 Cal. Rptr. 827, 833 (Cal. Ct. App. 1974) (quoting an earlier edition of *Black's Law Dictionary*, which defines public interest as "[s]omething in which the public, the *community at large*, has some *pecuniary interest*, or some interest by which their *legal rights or liabilities are affected*" (emphasis added) (citation omitted)); Russell v. Wheeler, 439 P.2d 43, 46 (Colo. 1968) ("A public interest is an interest shared by citizens generally in the affairs of local, state or national government.").

361. *Goldberg*, 112 Cal. Rptr. at 833 (citations omitted).

362. 2 ARISTOTLE, *Politics*, *in* THE COMPLETE WORKS OF ARISTOTLE, *supra* note 174, at 1986.

conflict, the public interest takes priority because the public interest aims at the higher good. Most often, the notion of the public interest is invoked and referenced by legislators acting to protect the interests of the whole community. For example, in *Moore*, the Texas legislature dictated that prenuptial agreements must be voluntary,[363] the meaning of which becomes the site where the court in *Moore* must do equity by rejecting Gary's argument that Caroline's signing was voluntary because he did not force her to sign it by violence.

The priority of the public interest over private ordering is not just an element of legislative action, but it is also reflected in the common law and principles of equity. In *ABRY*, we see the priority of the public interest insofar as the court invokes the public order established under Delaware law to trump the private order of the contract that contains the fraudulent misrepresentations. This priority in turn clearly manifests the priority of the good of the whole and the totality of its parts over the discrete interests of any single part. That the court allows the Buyer to proceed to trial is, in my view, both just and correct precisely because, and to the extent that, the contract the Buyer seeks to invalidate involves a party's allegedly knowing efforts to manipulate perceptions in order to advance its interest in selling a deceitfully overpriced company—not for any greater good—but on the contrary, at the detrimental expense of the other party. In both *Moore* and *ABRY*, public interest trumps private order and if one looks for justification one need look no further than Aristotle, for public interest must trump private order precisely because it seeks and concerns a higher good.

What is the higher good achieved by granting the Buyer's request for the equitable remedy called rescission? The higher good is the preservation of the form of the contract as one that excludes intentional misrepresentations and deceit from its form and thereby sustains its integrity as a means of private ordering. Put differently, if the Buyer can ultimately prove that the Seller knowingly participated in deceiving the Buyer, the Seller's refusal to take back the Company would allow it to retain a profit obtained not only at the expense of the Buyer's just interest in getting the Company it was promised, but also the common interest in preserving the integrity of contract as a form for the organization of private order. How could contracts thereafter perform this role if lies and misrepresentations within the four corners of the contract were to be enforced against a contracting party who in good faith relied upon the truth of the promise that was given in exchange for the promise the liar

363. *See* Moore v. Moore, 383 S.W.3d 190, 194–95 (citing TEX. FAM. CODE ANN. § 4.006(a)(1) (West 2006)).

now sought to enforce to the victim's detriment on the basis of the liar's lie?

Put differently, though the objective of contract law is to enable private ordering, its mechanism is the exchange of enforceable promises; preserving the integrity of this mechanism must be understood as a matter of public good, not private order. This is because the exchange of promises cannot operate as an effective vehicle of private ordering if the promises that constitute the contract are false, and therefore, unreliable. If contractual frauds were nonetheless enforced by the courts, contract would soon lose its capacity to sustain private order. Contracts would become useless because no agreement could presuppose that the representations that constituted the agreement were true. The enforcement of fraud adds peril to uncertainty and would effectively unravel the form of the contract. Thus, from this perspective, public good must trump private order if for no other reason than to preserve the community's capacity for private ordering. Tort trumps contract precisely in order to preserve contract.

IV. THE *EARL OF OXFORD'S CASE* (1615): EQUITY AND OPPORTUNISM IN EARLY REAL ESTATE DEVELOPMENT

I raise the *Earl of Oxford's Case*[364] as a third view on the general issue of the way the law has learned—over time and across cultural contexts—to deal with the injuries caused by fraud and deception. Although the drama of fraud in this case takes a different structure than it did in either *Moore* or *ABRY*, the case provides a powerful point of reference for uncovering and appreciating the significance of Aristotle's thought for current day concerns—like those reflected in *Moore* and *ABRY*. This is particularly so if Professor Klimchuck is correct in asserting that Lord Ellesmere's opinion in the *Earl of Oxford's Case* is the first time that Aristotle's understanding of equity is invoked as justification for the primacy of equity over common law.[365] Focusing on the way Aristotle is made to appear in Ellesmere's treatment of the issues raised by the positions taken—both by the litigants and the rival court systems—in the *Earl of Oxford's Case*, shows how Aristotle's understanding of equity both triggers and resolves the dispute between law and equity, even as it clarifies the competing understandings of justice at issue in the three cases.

The case also provides a particularly meaningful opportunity to demonstrate—in a different context—the insights to be had from apply-

364. (1615) 21 Eng. Rep. 485 (Ch.).

365. *See* Klimchuk, *supra* note 141, at 1.

ing the method of narrative-in-reverse.[366] Narrative-in-reverse enables us to imagine the context that makes the dispute in the *Earl of Oxford's Case* and its resolution at equity both intelligible in its own historical context and relevant to an assessment of the courts' treatment of the fraud and deception confronted by the Texas state courts in *Moore* and the Delaware Court of Chancery in *ABRY*. Tracing these interconnections in turn demonstrates the power of reason—as it is institutionalized and transmitted through the network of legal systems at play in these three cases—to establish conceptual frameworks suitable to the challenge of resolving disputes in ways that give form and effect to justice. At the same time, the specifics of the three cases—their concern with fraud and deceit—remind us that the best thinking, the formative and foundational ideas upon which America's civil society is historically grounded, repudiate lies and deception and refuse to allow courts to abdicate their duty to achieve justice to the harshness of rigid rules, which the clever historically have and currently continue to manipulate to their overreaching advantage. Equally important, these foundational ideas repudiate as well the nihilism implicit in dismissing or otherwise minimizing the significance of lies and deceit as either irresolvable or inconsequential "mere bullshit." Narrative-in-reverse, in this context, shows that while drama may underlie all legal disputes, legal disputes are not just drama.

A. *The Story*

The *Earl of Oxford's Case* appears in White and Tudor's *Landmark Cases in Equity* and has long been hailed as the leading case addressing the relationship between English common law and equity.[367] If you research the meaning of "Equity" online, you will immediately encounter an entry on Wikipedia that deals with equity first and foremost as a matter of "Finance, Accounting and Ownership," but if you dig just a little deeper, you will find in this entry a heading called "Fairness" and will further discover that the first link under this heading refers to "Equity (legal concept)."[368] If you click this link, you will find text that explains a bit of the historical relationship between English common law

366. *Narrative-in-reverse* is similar to reverse engineering as discussed *supra* note 140 and accompanying text.

367. *See* David Ibbetson, *The* Earl of Oxford's Case *(1615), in* LANDMARK CASES IN EQUITY (Charles Mitchell & Paul Mitchell eds., 2012). An enormous debt is owed to Professor Ibbetson's widely cited work in providing a thoroughgoing presentation of the background, historical documents, and factual and procedural posture of the case. Only the essence of the case is raised in this piece for purposes of discussing the role of equity in the analysis of ethical considerations in rectifying fraud.

368. *Equity*, WIKIPEDIA, http://en.wikipedia.org/wiki/Equity (last updated Feb. 1, 2014).

and equity.[369] To be sure, unlike White and Tudor's *Leading Cases in Equity*, Wikipedia is not a resource traditionally consulted in the pursuit of legal knowledge, but consulting it here provides an opportunity to demonstrate why equity is wise to get its knowledge from whatever source proves helpful.[370] At the same time, it is important to recognize that data so gathered, at best, constitutes only raw information.[371] Though raw information most certainly yields insight, it nevertheless requires the informed intelligence and imaginative recreation of narrative-in-reverse, which operates to place the data in a context necessary to grasp the case across an otherwise daunting historical divide.

In this case, narrative-in-reverse will reveal itself as a method that enables intelligible answers to questions triggered, but not answered, by the surface account presented in the Wikipedia entry, even as the entry provides a valuable launching point for synthesizing other data, including from more authoritative sources, into a meaningful interpretation of the equities at stake in the *Earl of Oxford's Case*. Put differently, in this presentation, narrative-in-reverse provides the means to combine the historical data obtained from this Wikipedia entry with accounts and analysis offered elsewhere to reveal the legal culture within which the dispute was cast as a battle between law and equity, as well as the power struggles at play among the College's Master, the Earls, the tenants, the Col-

369. *Equity (legal concept)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Equity_(legal_concept) (last updated Feb. 20, 2014).

370. *See e.g.*, Klimchuck, *supra* note 141, at 18. Equity invokes "conscience," originally understood as facts known to be true and relevant to the equitable resolution of a case but not admissible under the rules of evidence. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 180 (Little & Brown 5th ed. 1956) (1929).

371. The Wikipedia entry on *Equity (Legal Concept)*, like many—though not all Wikipedia entries, just brushes the surface—something completely inadequate unless you are willing and able to go deeper. *See The Daily Show with John Stewart* (Comedy Central television broadcast Sept. 3, 2013), *available at* http://thedailyshow.cc.com/videos/ywpr93/uncle-jonny-stew-s-good-time-syria-jamboree (discussing ineffective foreign policy options at 5:53). It is worth noting the rise of Wikipedia, on the one hand, and comedy news shows like Jon Stewart's DAILY SHOW and Stephen Colbert's COLBERT REPORT on the other. In both instances, the media at issue is being used to communicate facts and interpretations to an audience perhaps otherwise ignorant of, or uninterested in, subjects that are both serious and complicated, but nevertheless of profound significance to their current and future well-being. While this Article reveals how the historical evolution and current treatment of fraud at law and in equity is critically important to our current efforts to combat the forces that would otherwise reduce our family and business relations to meaningless bullshit, this footnote challenges us to reflect on the fact that none of this knowledge is of any use if it is lost or rendered irrelevant by the failure to communicate it in a register that grabs the interest and attention of its intended audience. From this perspective, Wikipedia and comedy news shows cater to our desire to know things we know we ought to know something about, but they operate at a surface level, even in taking up such serious topics as the question whether to begin a bombing campaign that could potentially result in a nuclear exchange. Because they operate at a surface level, knowledge obtained from Wikipedia, as from comedy news shows, must be supplemented. In such instances, the supplement is not to be found at the tip, but only in thoughtful research that is unhindered by disciplinary boundaries.

lege's Bursar, not to mention between the King's Bench, the Court of Chancery, and the King himself. While the Wikipedia entry does not probe these matters, it does set the stage for this treatment by providing the surface orientation that follows.[372]

English common law courts emerged from the medieval "courts of law" that enforced the King's law across the realm. These courts were operated by judges educated in law; over time, the courts evolved a body of precedents that eventually became the Common Law of England, but owing to its formalities, judgment at common law sometimes produced harsh results.[373] In response, the King recognized his subjects' right to appeal directly to the sovereign mercy of the King.[374] Initially, the King would resolve these cases as his conscience dictated, but ultimately the task was delegated to the Chancellor.[375] Until the sixteenth century, when Sir Thomas Moore became the first lawyer appointed Chancellor, Chancellors were clergymen, more familiar with theology and classical Roman civil and canon law than the common law.[376] Having no formal training in law and thus unrestrained by precedent, the decisions of the Court of Chancery nevertheless evolved over time into a body of equitable doctrines, but at equity, the outcome of a case was still very much at the discretion of the particular individual who happened to be Chancellor, so much so that equity was criticized, particularly by the common law courts, as lawless and arbitrary.[377]

The *Earl of Oxford's Case* arose in 1615 from, and attempts to resolve, the rivalry that emerged between the common law courts and the Court of Chancery. The key issue in dispute was whether Chancery had legitimate authority to intervene in a dispute on behalf of a party after judgment had been entered at common law for the opposing party in that same dispute.[378] In 1579, the King's Bench had determined that Chancery did not have this authority, but King James I nevertheless granted Chancery the authority to issue injunctions against the enforcement of common law judgments issued by the King's Bench, thus further fomenting the rivalry between the two court systems.[379] This rivalry escalated in the seventeenth century as Chancery developed its practice

372. *Equity (Legal Concept)*, *supra* note 369. The account that follows is taken in part from this entry, albeit cross-checked against the entry's footnotes and other resources cited herein.

373. *See, e.g.*, Fowler, *supra* note 165, at 21.

374. *See, e.g., id.*

375. *See, e.g.*, PLUCKNETT, *supra* note 370, at 178–79.

376. *See id.* at 685–88.

377. *See* Subrin, *supra* note 166, at 920.

378. *See* Ibbetson, *supra* note 367, at 2 (citing JOHN BAKER, 6 OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 173–79 (2003)).

379. *Id.* at 2–3. ("[I]n June 1616 the King himself gave a speech to the Star Chamber affirming the legitimacy of Chancery intervention.").

of issuing what came to be called "common injunctions."[380] These injunctions prohibited the enforcement of judgments rendered by the common law courts when these judgments were determined by Chancery to be against equity.[381] The penalty for disregarding a common injunction was imprisonment for contempt.[382] Vexed by this interference in the execution of its judgments, the King's Bench responded by granting writs of habeas corpus commanding the release of individuals imprisoned by Chancery for disobeying its common injunction, and in return threatened indictments for defying common law judgments.[383] By 1615, the judicial scrum for control over cases and litigants was in full swing.

Enter the *Earl of Oxford's Case*.[384] The case involved approximately seven acres of land known as the "Covent Garden" and the Rectory of Christ's Church located just outside London. Magdalene College, "by far the poorest of the colleges in Cambridge at this time," had acquired the rectory and the garden by bequest in 1544.[385] Almost immediately thereafter, the nearly insolvent College leased the rectory and the land to an adjacent landowner for a rent of £20 per year.[386] But more money was yet to be squeezed from these assets. By the 1570s, the College was scheming to find new ways to increase its revenue from the leased land.[387] In 1574, the College, headed by Master Roger Kelke, entered into an agreement to convey the land and rectory, via an intermediate transfer to Queen Elizabeth, to a moneylender to the Queen and one of the richest men in London, a Benedict Spinola, to whom the College was in debt.[388] The transaction has been characterized as one involving the college's headmaster Kelke "cravenly" serving royal interests by agreeing to such favorable terms for the Queen's moneylender, Spinola, over the interests of the College—"fraud, at which the highest in the land connived."[389]

The intermediate conveyance by way of the Queen aimed to avoid

380. *See* Jacobs, *supra* note 163, at 4.

381. *See* ROBERT MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 12 (27th ed. 1973) ("A plaintiff who had obtained a judgment in his favour in a court of law might be prevented from enforcing it by a 'common injunction' granted by the Court of Chancery, because in the opinion of the latter court he had obtained the judgment unfairly.").

382. W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458 (3d ed. 1922).

383. *Id.* at 458–61.

384. (1615) 21 Eng. Rep. 485 (Ch.). Professor Ibbetson, *supra* note 367, provides the following discussion of the history of the case.

385. Ibbetson, *supra* note 367, at 4–5.

386. *Id.* at 4.

387. *See id.* at 5.

388. *Id.* at 5–6.

389. *Id.* at 6 & n.34 (citations omitted). Still, there is evidence that the College could not survive given its destitute poverty without exploiting the only saleable asset it could convey. The

a statute that placed a term limit of twenty-one years on any property interest transferred to any person by any college or cathedral.[390] The belief was that a transfer from the Queen would be interpreted by the courts to grant unimpeachable title to the transferee notwithstanding the express terms of the statute.[391] At least that is what Spinola believed when he bought the land from the College and what the Earl of Oxford must have imagined, when five years later, in 1580, he purchased it from Spinola and his many tenants thereafter, over many years, proceeded to build 130 houses on the land.[392]

It is worth noting that Spinola actually sold the land to several servants of the Earl of Oxford for £2,500 in installments, after which Spinola disappears from the records.[393] The agreement for sale was reportedly made through the Earl's servants because the Earl had agreed to a duel several days prior, and he had a checkered credit history.[394] The Earl died on June 24, 1604, seised of the land, and the property descended to his heir, a minor in wardship.[395] The records also show that the Earl of Oxford and his tenants expended a considerable amount of money—some £10,000—developing the land with a colony of houses; additional penal bonds had been given for quiet possession to leaseholders; leaseholders had relied on the grant by the Queen to Spinola via the Queen's letters patent as the strongest guarantee of good title; and the purpose of the grant had been fulfilled insofar as the grant enabled the College to maximize its financial position by the moneys received from Spinola for this transfer and use of the land.[396]

The dispute at issue in the *Earl of Oxford's Case* began when a subsequent Master of Magdalene College formally ejected and dispossessed a tenant of the Earl of Oxford, then leased the land it no longer owned to John Smith, the College's Bursar, with the apparent intent to try title to the land.[397] The new Earl of Oxford brought suit and the case

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problem was that tenants held leases that had more than forty years left to run on the land. *See id.* at 8.

390. *Id.* at 5.

391. *Id.* at 8.

392. *See* Klimchuk, *supra* note 141, at 14.

393. *See* Ibbetson, *supra* note 367, at 11. Spinola and the Earl had a preexisting financial relationship. "[W]hile Oxford was travelling in Continental Europe after 1575 Spinola had been a channel for communication—and more importantly cash—between him and his father-in-law, Lord Burghley." *Id.* at 11 n.60.

394. *Id.* at 11.

395. *Id.* at 13.

396. *Id.* at 18–19; *see also* Earl of Oxford's Case, (1615) 21 Eng. Rep. 485 (Ch.) (noting that the Earl of Oxford had overseen the construction of 130 houses on the property).

397. *See* Ibbetson, *supra* note 367, at 13; *see also Earl of Oxford's Case*, 21 Eng. Rep. at 485. Ellesmere, referring to the college's entry by "undue Means" wrote:

> The present Master of the College having by undue Means obtained the Possession

was tried at common law.[398] The dispute went to the King's Bench after a jury found that the College's Bursar had taken possession unlawfully.[399] In an opinion characterized by markedly formalist reasoning, Sir Edward Coke, Lord Chief Justice of the King's Bench, reversed the jury's finding.[400] According to Chief Justice Coke, the initial transfer to Spinola was void because the Queen was a "person" under the statute limiting the transfer to any "person" of any property interest in lands owned by colleges or cathedrals to a term of 21 years.[401] Coke determined that "the Queen, . . . 'the fountain of justice and common right,' could not be exempted by construction from a statute that aim[ed] at the public goods of the maintenance of religion, the advancement of learning, and the sustenance of the poor."[402] This reasoning was viewed as rigidly formalistic in part because "[n]owhere was it ever suggested that it might have been remotely relevant that Spinola, the Earls of Oxford and their tenants had spent a great deal of money developing the land, and that the college might have been attempting to make a wholly unjustified windfall profit."[403]

The Earl of Oxford responded by bringing the case to Chancery. Rather than answering the complaint, the defendants demurred asserting that the case was inappropriate for Chancery on two grounds: First, they had already won a judgment at law in their favor and, second, that judgment was based on a statute.[404] How Lord Chancellor Baron Ellesmere, of the Court of Chancery, dealt with these two arguments reveals the extent to which his reasoning tracked the concerns expressed in Aristotle's treatment of equity. Lord Ellesmere's concern is to articulate and justify a relationship between equity and the common law as a result of which the Court of Chancery legitimately can assert the authority to intervene in cases when the common law judgment produces inequitable results and thereby to establish both the independence and the proper relationship between Chancery and the common law courts.

> of one of the 130 Houses, whereof one Castillion was Lessee, who being secure of his Title both in Law and Equity, sealed a Lease thereof for three Years to one Warren, who thereupon brought an Ejectment against one John Smith, for Trial of the Title in B. R. wherein a Special Verdict was had; and while that depended in Argument the Lease ended, and so not Possession could be awarded for the Plaintiff, nor Fruit had of his Suit.

Earl of Oxford's Case, 21 Eng. Rep. at 485.

398. Ibbetson, *supra* note 367, at 13.

399. *See id.* at 13–15.

400. *See id.* at 15–16.

401. *See id.* at 16–17; *see also* Klimchuk, *supra* note 141, at 14.

402. Klimchuk, *supra* note 141, at 14.

403. Ibbetson, *supra* note 367, at 18.

404. Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486 (Ch.).

B. *Aristotle's Equity and the Primacy of Chancery*

In the *Nichomachean Ethics*, Aristotle takes up the matter of equity with respect to three aspects that are reflected in Lord Ellesmere's account of the relationship between English common law and equity. These three aspects concern the nature of equity as distinct from justice or, more precisely, as distinct from what is "legally just"; the relationship between equity and law or, more precisely, which should have primacy; and the question of *how* to do equity in particular cases.[405]

With respect to justice, Aristotle's first concern is precisely to determine whether what is equitable is different from what is just, and if so, whether it is better, or whether the just is better than the equitable. He concludes that the same thing is just and equitable, and while both are good, what is equitable is superior.[406] To explain the basis for the asserted superiority of equity, he asserts that "what is equitable is just, but not what is legally just—rather a correction of it."[407] Equity, in his view, is a correction of the error that sometimes results from the fact that "all law is universal, and there are some things about which one cannot speak correctly in universal terms."[408] Because the law must oftentimes speak in general terms, it takes account of what happens more often—the ordinary and routine, rather than the unique and exceptional—and it addresses itself to the former and not to the latter. But the unique and exceptional cannot be regulated justly by law precisely because the law speaks in universal terms:

> This is also the reason why not everything is regulated by law: about some things it is impossible to legislate, so that a special decree is required. For when the object is indeterminate, so also is the rule, like the leaden rule of Lesbian architecture. Just as this rule adapts to fit the shape of the stone and does not remain rigid, so the special decree adapts to fit the circumstances.[409]

This account in turn raises a question Lord Ellesmere also confronts: whether equity is above or external to the law, or whether it supplements the law in a way that is consistent with, and therefore respectful of, the law. In Aristotle's view, equity corrects the error of law as its universality is improperly applied to the particularity of a specific case, but the

405. *See* ARISTOTLE, *supra* note 155, at 99–101.

406. *Id.* at 100.

407. *Id. See supra* Part II.B. Aristotle's understanding of equity links twenty-first-century Texas state court statutory interpretation of the meaning of voluntariness to seventeenth-century Chancery's injunction against statutory enforcement to avoid unjust enrichment thus demonstrating Aristotle's transcultural and transhistorical significance to the production of legal justice.

408. *See* ARISTOTLE, *supra* note 155, at 100.

409. *Id.*

error it corrects "is attributable not to the law, nor to the law-giver, but to the nature of the case."[410] The application is improper not because the law is not good or just, but because in some instances, a case may arise that is an exception to the universal rule. In such case, applying the universal rule, which is generally good, produces injustice, and it is here that equity operates to correct the law. Aristotle sums up the relationship by observing, "what is equitable is [therefore] just."[411] It is not better than "unqualified justice," but it is "better than the error that results from its lacking qualification."[412] If the case fits within the universal rule of legal justice, then legal justice and equity point in the same direction and are equally good and just; but when the case is an exception to the routine and ordinary addressed by law, what is equitable is superior to what is legally just insofar as it adapts to fit the circumstances and thus corrects the error of law, "where it is deficient on account of its universality."[413]

In light of this account, Aristotle then offers two examples of how equity is to be done by imagining the manner in which or, more precisely, the reasons why law speaks in universal terms. In both examples, equity requires that we imagine the intent of the reasonable legislator. What we are to imagine is a situation in which "the law-giver fails us and has made an error by speaking without qualification."[414] This happens when the law speaks in general terms that do not address the specific case. Equity corrects the omission by saying what the legislator would have included within the law to address the exception had it been foreseen. Equity in this instance corrects a gap in the law—its underinclusiveness—as when it fails to imagine and therefore fails to take into account an unimaginable fraud. But the law may err by speaking "without qualification" in a second way, in this case, not by omission, but by overgeneralization—such that a specific case that ought to be exempted is nevertheless caught within the universal law, and injustice results unless corrected by equity.[415]

410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. This understanding of equity's correction of the law for being under and overinclusive is something Plato, Aristotle's teacher and precursor, might—but to my knowledge did not—cast as correcting the errors of excess and deficiency. *See, e.g.*, PLATO, *Statesman*, *in* COLLECTED DIALOGUES OF PLATO 1018, 1049–51 (Edith Hamilton & Huntington Cairns eds., Lane Cooper, et al. trans., Princeton Univ. Press, 10th ed. 1980) (c. 428 B.C.E.); Elizabeth M. Iglesias & Madeleine M. Plasencia, Hamilton's Stranger: Torture, Truth, and the American Experiment in Enlightened Self-Government 270 (unpublished manuscript) (manuscript on file with author) (explaining that statesmanship is found and practiced in the mean between excess and deficiency). Whatever its pedigree, this understanding provides a perspective from which equity might be

C. *The Battle of Law and Equity in the* Earl of Oxford's Case

Lord Ellesmere tells us that the College "would silence Equity" on two grounds: First, the College has a judgment at law and second that judgment is based on a statute.[416] His answer to each comprises the defense of the independence of equity for which the case is famous. And it aims to show that in holding for the Earl, Chancery would not be disrespecting the authority of statutes. I take up first the arguments and concerns surrounding the fact that in enjoining the judgment of the King's Bench, Chancery was enjoining a judgment based on a statute. My objective is to assess these matters in light of Aristotle's understanding of equity as it informs Lord Ellesmere's treatment of the issues.

In the *Earl of Oxford's Case*, the first master who negotiated the original transfer to Spinola may not have intended that the next master would seek to void the transfer as a violation of the statute, which the first master conspired with Spinola to circumvent by way of the intermediate transfer to the Queen.[417] Still, Lord Ellesmere maintains that equity does well to correct the harshness of Chief Justice Coke's judgment for the Master on the statute.[418] This is because in this specific case, the Master invoked the statute to dispossess the Earl and his tenants notwithstanding their substantial investments in improving the land based on their reliance on the validity of the transfer of title.[419] In this way, the Master sought to extract further profit by reasserting title to land the College had already sold and to which it had no claim to ownership but for its claim to invalidate the transfer under the same statute it had conspired to avoid through the intermediate conveyance to the Queen. Moreover, in reasserting title, the College sought to capture the increased value attributable to improvements made to the land without compensating the dispossessed.[420]

That the Court of Chancery should intervene to enjoin enforcement of Chief Justice Coke's judgment allowing the College to void the transfer on the basis of the statute did not imply a disrespect for, nor subordination of the law to equity, but rather what Aristotle would call "a correction of the law, where it is deficient on account of its universal-

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understood as the mean between excess and deficiency. This understanding could then be tested out in the context of specific cases using the method of narrative-in-reverse. This mental exercise would help its practitioner to develop a deeper and broader understanding of what equity has meant in the past and what it should mean in the future.

416. Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486 (Ch.).

417. *See* Ibbetson, *supra* note 367, at 4–6.

418. *See Earl of Oxford's Case*, 21 Eng. Rep. at 486–87.

419. *See id.* at 487.

420. *See* Ibbetson, *supra* note 367, at 28.

ity."[421] The statute at issue was concededly both good and just. Its restriction on the transfer of property held by colleges and cathedrals was enacted, as Chief Justice Coke noted, for "the maintenance of religion, the advancement of learning, and the sustenance of the poor."[422] The error of application in this case is not attributable to the law, nor the law-giver, but to the nature of the case. In voiding a transfer of property in violation of a statute restricting such transfer, the law simply takes into account and applies a universal rule, and according to Aristotle, it is no less correct for doing this.[423] Nevertheless, what is legally just is not necessarily what is equitable.[424] This is precisely because the legally just does not adapt to fit the circumstances of the case. Thus, equity is a correction of the law, where its application is deficient on account of its universality, and in such correction, equity neither disrespects, nor subordinates the law, but rather supplements and completes it. As Lord Ellesmere puts it, "[t]he Cause why there is Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."[425] Although Ellesmere does not expressly cite to Aristotle, the passage tracks Aristotle's account of equity in the *Nichomachean Ethics*, where Aristotle explains why the equitable is superior to the just, though both are good: "[W]hat is equitable is just, but not what is legally just—rather a correction of it. *The reason is that all law is universal, and there are some things about which one cannot speak correctly in universal terms*."[426]

What makes the application of the statute unjust in the *Earl of Oxford's Case* is not the statute, but the failure to adapt it to the circumstances, which in this case means taking into account the "corrupt conscience" of the Master of the College:

> By all which Cases it appeareth, That when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party; and that in such Cases the Judges also play the Chancellors; and that these are not within the Statute 4 H. 4, cap. 23.[427]

Lord Ellesmere notes that the conveyance concerned land "advanced by the Purchasers from a Thing of little Value to a great and considerable

421. ARISTOTLE, *supra* note 155, at 100.
422. *See* Klimchuk, *supra* note 141, at 14.
423. *See* ARISTOTLE, *supra* note 155, at 100.
424. *Id.*
425. Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486 (Ch.).
426. ARISTOTLE, *supra* note 155, at 100 (emphasis added).
427. *Earl of Oxford's Case*, 21 Eng. Rep. at 487.

one."[428] According to Ellesmere, both the law of God and equity supported the Earl and his tenants' claim, and nothing in the common law opposed it. By the Law of God, Ellesmere referred to a passage from the Book of Deuteronomy: "He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof."[429] In asserting title to the disputed land, the Master of the College claimed the benefit of the improvements made by the Earl and his tenants—houses the College had not built and gardens it had not planted. In a stinging indictment, Lord Ellesmere both characterizes the "corrupt Consciences" reflected in the Master's position and asserts that, in this case, equity and the common law point in the same direction.[430] This is because the College gave no consideration for the value of the houses and gardens the Master sought to lay claim to.[431] Where the common law requires evidence of consideration, equity demands a *quid pro quo* to prevent unjust enrichment:

> And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the Houses, Gardens and Orchards, which he neither built nor planted: But the Chancellors have always corrected such corrupt Consciences, and caused them to render *quid pro quo*; for the Common Law it self will admit no Contract to be good without *quid pro quo*, or Land to pass without a valuable Consideration, and therefore Equity must see that proportionable Satisfaction be made in this Case.[432]

In reaching this conclusion, Lord Ellesmere invoked a precedent involving a case where a husband had leased land held jointly with his wife to a tenant, who, ignorant of the defeasible title, invested substantial sums of money and improved the land and erected a building on it.[433] After the husband died, the wife initiated an action of ejectment to avoid the tenant's lease. Ultimately, the wife "was compelled in Equity to yield a Recompense for the Building and Bettering of the Land."[434] Like the tenant in the *Peterson* case, the Earl and his tenants had invested vast sums, except here, the College aimed to avoid the leases and not pay a pence or pound for the improvements and 130 houses.[435] This, Ellesmere concluded, reflected the hard conscience of the party that it was equity's duty to correct:

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428. *Id.* at 485.

429. *Id.* at 486 (quoting *Deuteronomy* 28:30).

430. *Id.*

431. *Id.*

432. *Id.*

433. *See id.*; *see also* Ibbetson, *supra* note 367, at 29 (providing some background on the case discussed by Ellesmere).

434. *Earl of Oxford's Case*, 21 Eng. Rep. at 486.

435. *See id.*

> The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus*.
>
> And for the Judgment, &c., Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice ; and yet they both aim at one and the same End, which is, to do Right ; as Justice and Mercy differ in their Effects and Operations, yet both join in the Manifestation of God's Glory.[436]

As further evidence of the complementary operation of law and equity and as refutation of any claim that Chancery was somehow lawless in disregarding the statute that prohibited the transfer that grounded the Earl and his tenants' interest in the land, Ellesmere noted that previously, in *Dr. Bonham's Case*, Coke himself had held that the common law can control acts of Parliament and declare them void if they are against common right or reason.[437] Common law judges play the Chancellor's part in taking equitable construction of statutes to be the law itself.[438] As it turned out, the King himself ordered Lord Chancellor Bacon to affirm Ellesmere's Chancery decree with strong words of the King's role in such a matter, "to take care and provide that the rigour of the law might be so tempered with equity as that his majesty's subjects might not by colour of law be pressed with any hard and avoidable extremities."[439]

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436. *Id.*

437. *Id.* at 487–88.

438. *See id.* Chief Justice Coke's gyrations on this particular point might explain why the King would join Chancery against the enforcement of the King's own law, separate and apart from the matter of securing justice as between the College and the Earl. This is because Lord Ellesmere's reference to Chief Justice Coke's self-contradiction clearly reveals what is otherwise buried. The dispute between the common law courts and the courts of chancery is an issue of the King's law versus the King's conscience—the self against the self. Chief Justice Coke is a tad hypocritical to the extent he enlists on his side then circulating attacks on Chancery as disrespectful and disobedient of the law, for as Lord Ellesmere meaningfully points out, the Chief Justice of the King's Bench had previously announced that his understanding of what "common right" and "reason" required might overrule the King's law. *See id.* Although this observation helps to clarify the dispute in its historical context and reveals a fruitful perspective on the battle between law and equity, it is important to recognize that this perspective is naught but hypothesis—albeit it a fine example both of the value of narrative-in-reverse and the need to seek deeper broader knowledge beyond the surface generalities provided by Wikipedia entries. In this case, both are demonstrated by reflecting on the fact that while the Wikipedia entry's reference to the King's intervention on behalf of Chancery and in opposition to the King's Law might have triggered some puzzlement over why the King would intervene against his own law, it does not answer, nor even provide grounds for imagining an answer to the why question. *See Equity (legal concept)*, *supra* note 369. Understanding the legal battle in progress in the *Earl of Oxford Case* does, but attaining that understanding requires that we consult and, crucially synthesize, a broad range of resources including both historical texts and learned commentary.

439. Ibbetson, *supra* note 367, at 22 (citation omitted). By 1624, one would have thought that the finality of the decree entered at the behest of the King forbidding any further court

The key idea Ellesmere communicates is that Chancery corrects litigants' consciences for particular sorts of wrongs. It is not true that equity will allow a party to enforce his legal rights under every circumstance. In this case, the College is estopped from asserting the statute as a basis for reclaiming the land from the Earl and his tenants because allowing such a claim will produce unjust enrichment.[440] Asserting rights to secure one's own unjust enrichment is a good example of what Aristotle would call standing on one's rights in a bad way—what the inequitable person does.[441] It is contrary to conscience, and equity prevents persons from exercising their legal rights when doing so would be contrary to conscience. But this does not mean that equity changes what the law requires. If the law requires that a property transfer be voided, then voiding the transfer is just, but it is one kind a justice, a kind that is inferior to equity, which corrects the harshness of the law by taking into account the unfairness of voiding the transfer insofar as it enables the College to be unjustly enriched by the improvements made in reliance on the legitimacy of its own prior transfer. The harshness of law is its indifference to the improvements made by the Earl and his tenants. In asserting the statute to reclaim the land, the college stands on its rights in a bad way. What it requests from the law is inequitable, and equity intervenes to correct the deficiency of the law on account of its being applied without adapting itself to fit these circumstances. Equity steps in when the law fails in the particular circumstances and prevents persons from standing on their rights when doing so would be against conscience.

Although concededly there are significant differences among the three cases treated in this Article, still there are similarities relevant to assessing the equities as between the opposing parties in all three cases. In all three cases, the party that loses by virtue of equity—in one form or another—invokes the courts, as Aristotle would say, to "stand on his rights in a bad way."[442] In *Moore*, Gary wants to stand on the rights of

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proceedings on the matter would have ended the case favorably for the Earl of Oxford and his tenants. Certainly, that would have been the fair expectation of the Earl of Oxford (and his representatives). The litigation and its issues had been finally and fully argued, adjudicated, and decided—requiring the college to accept future rents from the tenants in due course, and resulting in a final injunction served on the college to obey this decree. *Id.* at 22–23. Nevertheless, the newly elected MP Barnaby Goche for Cambridge University presented a bill in Parliament to overturn the Chancery decree. *Id.* at 23. Barnaby Goche had previously been the Master of Magdalene accepting the rent of £15 from one of the Oxford family's tenants of the Covent Garden in 1606. *Id.* at 5, 23. The Earl of Oxford presented his own bill into the House of Lords to affirm it. Both bills stalled in committee. *Id.* at 23. Since then, it appears that the college has from time to time contemplated the possibility of raising the matter yet again. *Id.* The more things change, the more they stay the same.

440. *See Earl of Oxford's Case*, 21 Eng. Rep. at 486.

441. *See* ARISTOTLE, *supra* note 155, at 100–01.

442. *Id.* at 101.

the prenuptial agreement, even though this agreement affords him rights in excess of those he would fairly enjoy under the otherwise applicable community property laws of the State of Texas, and even though he secured these overreaching rights through a coordinated scheme of trick and artifice designed to deceive his fiancée. He is foiled in this attempt insofar as the Texas courts invoke concepts of fraud to give meaning to the statutory defense of involuntariness and declare Caroline's agreement involuntary. The Seller in *ABRY* wants to stand on the rights of a Stock Purchase Agreement that it claims caps its liability and makes its capped liability the exclusive remedy even for its alleged intentional misrepresentations on the grounds that the Buyer expressly agreed to this limited liability and the contract so provides. In this case, the Seller is foiled in its attempt insofar as the Delaware Court of Chancery allows trial on the equitable remedy of rescission on the grounds that public policy abhors fraud within the terms of a contract. In the *Earl of Oxford's Case*, the College's Master wanted to stand on the right to assert title to land the College had previously sold for value, and to all the improvements subsequently made, on the grounds that the sale was in violation of a statute it had itself been complicit in avoiding through the artifice of an intermediate conveyance to the Queen in disregard of the statute. In all three cases, the effect of allowing the losing party to stand on the rights asserted would be to render the courts instrumental in advancing the fraudsters' objectives at the expense of what is equitable between the parties—equitable in this case, meaning, in Aristotle's formulation, what is "just, but not what is legally just—rather a correction of it."[443]

V. Conclusion

This Article concerns the pervasiveness of deception and misrepresentation that appears to saturate every corner of our private and public affairs. The most disturbing part of the reality of deceit and corruption that passes for bullshit and too often goes unremedied in our current day society is that the characters, in the many and various dramas that litter our courts and pollute the mindspace of our public discourse, inflict injury on others, even as they undermine the social trust, legal forms, and ethical understandings that underwrite their opportunity to choose differently—to choose equity and fairness over opportunism, deception, and greed. However, unlike in the tale of Pinocchio, to which I now turn, there is no evidence that redemption is desired. On the contrary, the cases examined in this Article are notable precisely because in each case

443. *Id.* at 100.

the courts push against what seems to prevail in our time as a stubborn and perverse insistence that it is better to stand on our rights in a bad way, than to waste our time assessing the relationship between the just and the equitable in order to discern what correct action requires, or to undermine our immediate interests in order to become what Aristotle would recognize as an "equitable person."

VI. SUPPLEMENT

A. *Pinocchio: A Tale of Error and Correction*

Perhaps these conclusions about liars and bullshitters are incomplete without at least mentioning the archetypal liar of children's literature, Pinocchio. As it turns out, even in the make-believe world conjured for children to vicariously learn the lessons suffered by Pinocchio, law is incomplete and ultimately ineffective without the saving aid of equity, which serves not as a dangerous, but as a life-giving supplement. In the late nineteenth century, Italian author, Carlo Collodi, produced for the world a timeless drama of error and correction through the use of allegory.[444] In *Le Avventure di Pinocchio*, a cobbler named Geppetto carves a puppet in the likeness of a boy and calls it Pinocchio. Though the puppet is carved from a single piece of ordinary firewood, Pinocchio is no ordinary puppet. The moment the cobbler finishes shaping Pinocchio's face, the puppet begins to make disrespectful and mocking faces at him. The moment he completes the puppet's feet, it kicks him and leaps off the table. The puppet talks, kicks, and runs—quickly springing across the floor and escaping to the outdoors where he begins the adventures through which he will eventually evolve from a lying puppet-boy into an ethical young man.

The wooden mischief-maker puppet Pinocchio—a confirmed rascal—is a good-bad-boy, cavorting and prancing in frivolity and rebellion with the bad-bad-boys against the instructions of his father, Geppetto. Confronted with the responsibility to choose his own path, time and again, Pinocchio chooses badly, renouncing his immanent real-boy status in pursuit of carefree pleasure to Funland, where there is no school or study, thus selling his soul to the Devil as it were. Thereafter, the spunky puppet is metamorphosed into a donkey, eaten down to his wooden core by a shoal of fish, swallowed alive by a giant sea-monster, chased by a band of assassins, and hung from a tree. Chapter by chapter, the puppet learns a new lesson, but time and again it seems he learns only through the hard knocks of life, as he is unable or unwilling to absorb and

444. CARLO COLLODI, THE ADVENTURES OF PINOCCHIO: STORY OF A PUPPET (Nicolas J. Perella trans., Univ. of Cal. Press 1986) (1883).

observe the instruction of Geppetto. The plot tracks Pinocchio's path of errors as he descends to the depths of betrayal. It is only when Pinocchio appears to have reached his end that he is saved through his encounter with the Fairy Mother—a more than thousand-year-old "beautiful Little Girl" with blue hair. It is in this encounter that he chooses differently, thereby sloughing off his wooden puppet shell in order to rise as a fully human and respectable boy-adult.[445]

B. *The Nose That Grows*

One of the most memorable motifs of Collodi's tale is Pinocchio's nose. Geppetto completes the *burattino*'s nose, but as soon as the nose was made, it began to grow; and it grew and grew and grew so that in a few minutes it became "an endless nose."[446] Geppetto, knowing this excessive growth bode ill for the puppet's potential entry into human civil society, struggled to cut it back; but "the more he cut and shortened it, the longer that impudent nose became."[447] After the nose, Geppetto made Pinocchio a mouth.[448] The mouth wasn't even finished before the puppet began to use it to mock him, sticking his tongue out at him and laughing.[449] Geppetto is unable to control or instruct his creation. The puppet mocks, kicks, and entirely vexes the cobbler until he is driven to curse at him, "*Scamp* of a child, you aren't even finished and you're already beginning to lack respect for your father! That's bad, my boy, bad!"[450]

Pinocchio's "endless nose" is a metaphor for the inveterate liar he becomes. It is that nose that causes Pinocchio to be caught by the Law, a *carabiniere* who snatches him neatly by his enormously long nose and hands him over to Geppetto.[451] Later, Pinocchio's giant nose encounters the world again when the Fairy appears to him. The Fairy asks him to produce four coins she knows Pinocchio has hidden in his pocket.[452] "I've lost them," replied Pinocchio, but as soon he had told this lie, his nose, which was already rather long, immediately grew another two inches.[453] Although it appeared at the beginning that Pinocchio was in control of his nose in that he quite exuberantly delighted in making it grow to Geppetto's intense consternation, when he lied in his encounter

445. *See generally* Nicolas J. Perella, *An Essay on Pinocchio*, *Introduction to* COLLODI, *supra* note 444.

446. COLLODI, *supra* note 444, at 99.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 99–101 (emphasis added).

451. *Id.* at 103.

452. *Id.* at 209.

453. *Id.*

with the Fairy, his nose grew involuntarily. Continued lies produced greater consternation for Pinocchio:

> At this third lie, his nose grew so extraordinarily long that poor Pinocchio could no longer turn around. If he turned this way he bumped his nose against the bed or the windowpanes; if he turned the other way, he bumped it against the wall or the door of the room; if he raised his head a little, he ran the risk of poking it into one of the Fairy's eyes.
>
> And the Fairy looked at him and laughed.
>
> "Why are you laughing?" the puppet asked her, quite embarrassed and worried about that nose of his that was growing before his very eyes.
>
> "I'm laughing at the lie you told."
>
> "How do you know that I've told a lie?"
>
> "Lies, my dear boy, are quickly discovered; because there are two kinds. There are lies with short legs, and lies with long noses. Yours is clearly of the long-nosed variety."
>
> Pinocchio, not knowing where to hide himself for shame, tried to run from the room; but he couldn't. His nose had grown so much that it could no longer pass through the door.[454]

The Fairy allows him to be thus tormented until he is so disfigured—his "eyes popping out of his head in wild despair"—that she takes pity on him and summons a thousand woodpeckers to perch on his nose and whittle it down to a natural size.[455] Having been thus chastened, and thereafter agreeing to study and professing his love and desire to have a mother, Pinocchio declaims against the life he has led as a puppet and entreats the Fairy to teach him to grow up. He asks:

> "But how did you manage to grow up so fast?"
>
> "It's a secret."
>
> "Teach it to me; I'd like to grow a little too. Don't you see? I'm still no taller than knee-high to a grasshopper."
>
> "But you can't grow," replied the Fairy.
>
> "Why not?"
>
> "Because puppets never grow. They are born as puppets, they live as puppets, and they die as puppets."
>
> "Oh, I'm sick and tired of always being a puppet!" cried Pinocchio, rapping himself on the head. "It's about time that I too became a man."
>
> Ma come avete fatto a crescere così presto?
>
> – È un segreto.

454. *Id.* at 211.
455. *Id.* at 213.

> – Insegnatemelo: vorrei crescere un poco anch'io. Non lo vedete? Sono sempre rimasto alto come un soldo di cacio.
>
> – Ma tu non puoi crescere – replicò la Fata.
>
> – Perché?
>
> – Perché i burattini non crescono mai. Nascono burattini, vivono burattini e muoiono burattini.
>
> – Oh! sono stufo di far sempre il burattino! – gridò Pinocchio, dandosi uno scappellotto. – Sarebbe ora che diventassi anch'io un uomo . . . [456]

In his introductory essay to *The Adventures of Pinocchio*, Nicolas Perella makes the critical observation that Pinocchio has two pedagogues.[457] Both Geppetto and the Fairy desire to instruct the puppet in the ways of being a proper boy.[458] According to Perella, in this tale, Geppetto is the used-up and abandoned father, while the Fairy is a magical being who simultaneously chides him for his errors and relieves his despair. As Perella shrewdly notes, it is only on account of his encounters with the Fairy that Pinocchio eventually concedes that he will have to go to school to become a proper—that is, an ethical—man.[459] Without the Fairy's intervention, Pinocchio was marked to continue a path upon which he not only would never evolve beyond his inauspicious beginnings as a stray log, he would die. Geppetto transforms a piece of ordinary firewood into a puppet and calls it Pinocchio; the Fairy sets Pinocchio on the correct path and thus transforms him from a puppet to a vital human being.

According to Perella, in plotting and developing the story of Pinocchio, Collodi revives an ancient man-as-puppet archetype that makes a prior appearance in Plato's *Laws*.[460] In this dialogue, Plato draws the account of human beings as puppets, created by gods, possibly as playthings.[461] Two opposing strings of pleasure and pain are used to control the human puppets, but the puppets do have an avenue of escape. It is by yielding only to the third string, the golden rein of reason, the "golden and hallowed drawing of judgment which goes by the name of

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456. *Id.* at 282–83 (footnote omitted). The term *burattino* has a strong and rich connotation in Italian. The *burattino* is

> one whose actual words and deeds contradict his professed beliefs so that he seems to act without any moral sense of his behavior . . . . [*B*]*urattino* was used to connote someone who is so lacking in will or opinions that his movements are regulated by someone else, as in the case of real puppets.

Perella, *supra* note 445, at 49.

457. *See generally* Perella, *supra* note 445.

458. *See id.* at 28–29.

459. *Id.* at 28.

460. *Id.* at 50.

461. PLATO, *Laws I*, *in* THE COLLECTED DIALOGUES OF PLATO, *supra* note 415, at 1225, 1243–45.

the *public law* of the city" that man may become virtuous.[462]

Who shall play the blue-haired saving mother, Fairy, or exasperated father, Geppetto, to the characters in dramas such as those recounted in *Moore*, *ABRY*, or the *Earl of Oxford's Case*? In other words, how are we to chasten the manipulating suitor who bamboozles his bride into signing an odious prenuptial agreement, the business firm who uses the technicalities of contract law to exculpate itself of liability for intentional misrepresentations and thereby claims a right to lie, or the college headmaster who kicks out the rubes who have built houses in the shade of the college's gardens, only to then shamelessly enlist the law in an effort to void the land sale that is the key to their legal title? How is the *burattino* who acts without any moral sense of his behavior in these stories to ever pay the piper or learn or grow up to become a proper member of a civilized society? What or who is to prevent another scenario from repeating the same or another tale of deception and injury demanding that justice correct the outcome?

If I were to cast the three cases that have grounded the inquiry in this Article as a window into the life story of the form of the contract, what we see in all three cases are the efforts of alleged fraudsters to hijack the form of the contract to perpetrate their fraud and thereafter to enlist the indifference of the law's universal rules to the equities of the particular case in order to advance their frauds at the expense of their immediate victims, as well as at the expense of individuals who may later find themselves in a similar position and look to the law for guidance and assistance.

The law instructs, in part, by allocating blame, delivering punishment, and providing relief in actual world cases, and in part by articulating the conceptual relations that warrant and justify the actions taken. As a body of ideas consulted for the purpose of resolving disputes precisely like the disputes in these three cases over the way fraud and deceit should be treated, law is a uniquely suitable vehicle for enabling us to assess and distinguish right from wrong. This is because the law, as a practice of resolving disputes based on principles of right action and justice, has for millennia called upon our mental faculties to think deeply about the coherence or disjuncture between the meaning we give these words and the meaning that is fairly inferred from the way these words are applied to resolve disputes in real world contexts—like the prenuptial agreements, business transactions, and landlord-tenant relations at issue in these three cases.

As a practice of resolving disputes, law has for millennia operated

462. *Id.* at 1244 (emphasis added).

through a network of legal systems—all interconnected by legal concepts that can be traced transhistorically and transculturally to certain foundational ideas, notwithstanding the different communities represented and addressed by these varied and various legal systems. Across the boundaries of marital relations and business transactions, torts and contracts, different states, different countries, indeed even different centuries, these cases nevertheless occupy a common field in which law has repeatedly been called upon to deal with the injuries caused by fraud and deception and has chosen to take these injuries seriously as a call and a duty both to do justice between the parties and to prioritize the public good over the inequities of private order. In none of these cases do the courts dismiss the frauds as mere bullshit. The complementary relationship between the universal rule of law and the correction of equity, from this perspective, is thus revealed as a site for the happy union of Geppetto's efforts to instruct Pinocchio and the Fairy Mother's efforts to correct him.