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Disentangling Perjury and Lying

Allison Douglass*

Committing perjury is frequently treated as closely related—if not equivalent—to lying. Both legal scholars of perjury and philosophers of lying make this assumption. This, in turn, informs subsequent conclusions about both the nature of perjury and the nature of lying. When evaluating perjury doctrine, some refer explicitly to philosophical theories of lying¹ or to common-sense morality² to gauge the validity of the doctrine.³ Conversely, a number of philosophers explicitly rely on examples from perjury law to prove general points about the nature of lying.⁴ At first glance, this seems like the ideal interplay between law and moral theory: a symbiotic relationship through which lawyers and philosophers learn from each other. However, such symbiosis only works if both sides of the dialogue are on the same page.

This Note challenges the assumption that perjury is equivalent to lying in any useful sense. Evaluating the theory and practice of perjury law

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1. See generally Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001); see also Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, if any, Should Lies be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 531 (“[L]ying is already criminalized in many contexts, such as perjury, criminal libel, and the making of false statements”); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 458 (“[I]nterpretive laws work by picking up and giving legal effect to the everyday semantic norms—the rules of conversational implicature—together with the familiar moral prohibition on lying”).

2. See Recent Case, *United States v. DeZam*, 157 F.3d 1042 (6th Cir. 1998), 112 HARV. L. REV. 1783, 1783 (1999).

3. See generally Laurence Horn, *Telling it Slant: Toward a Taxonomy of Deception*, in THE PRAGMATIC TURN IN LAW: INFERENCE AND INTERPRETATION (Janet Giltrow & Dieter Stein eds., forthcoming May 2017) (providing a survey both of perjury law and of philosophical accounts of lying).

4. See, e.g., Don Fallis, *Lying as a Violation of Grice’s First Maxim of Quality*, 66 DIALECTICA 563, 565 (2012) (providing the example of a defendant asserting his innocence when the evidence overwhelming shows that he committed murder); Jessica Keiser, *Bald-faced Lies: How to Make a Move in a Language Game Without Making a Move in a Conversation*, 173 PHIL. STUD. 461, 462 (2016) (providing the example of a witness lying to preserve the honor of his family when everyone in the room knows he previously agreed to be an informant); Jennifer Lackey, *Lies and Deception*, 73 ANALYSIS 236, 239 (2013) (providing the example of a bystander lying on the stand, which is “evidenced in least in part by the fact that she could be found guilty of perjury”); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 8 (1978) (referring to the witness oath as evidence that lying is about intent to deceive).

against live controversies in the philosophy of lying reveals that perjury law and theories of lying are grounded in very different considerations. Specifically, the adversarial context of witness examination undercuts many of the approaches that philosophers take to develop a coherent theory of lying. It therefore makes more sense to think of perjury as a functional doctrine providing rules to promote courtroom proceedings, rather than as a penalty for the offense of lying on the stand.

Part I surveys recent philosophical literature on lying. Rather than delving into specific theories of lying, I focus broadly on three points of tension in the literature: the distinction between assertion and implication, the role of intent to deceive, and the significance of speaker credibility. Each of these flashpoints indicates something different about the nature of lying, and so it is useful to get a sense for how to reconcile them. Ultimately, without taking a stance on a particular theory, I conclude that the most promising attempts to address these concerns are ones that are sensitive to the particular context and relationship in which a lie is told.

Part II, the bulk of this Note, turns to American perjury law, particularly federal perjury law. After briefly describing the current state of the law, I consider perjury theory and doctrine through the lens of the three issues identified in Part I. My aim here is to determine whether the approaches one may generally take toward addressing and reconciling these concerns apply well—or at all—in the specific context of perjury. Perhaps unsurprisingly, I conclude that they do not. Indeed, the case of perjury is not only inconsistent with many of the most promising routes to developing a coherent theory of lying—it actually inverts their logic, since it simultaneously involves increased and lessened expectations that a person will tell the truth. I focus particularly on perjury’s “literal truth rule,” which has sometimes been taken as analogous to the distinction many make between lying and non-lying forms of deception.

Part III endorses an alternate conception of perjury law, not as the law of lying at all, but rather as a targeted device to improve the functioning of the judicial system. I flesh this conception out by synthesizing some of the legal and philosophical literature on the subject, to further explain this account and why it is so easy to equate perjury with lying.

Before I move on, I offer a few brief points of clarification. The first regards the Note’s scope. My ultimate goal is fairly limited: I challenge the justification of a common assumption among lawyers and philosophers. However, in doing so I also provide a survey of the philosophical and legal literature surrounding perjury and draw connections between related concepts in both fields. As such, this Note should also provide groundwork in the study of lying in these two core fields.

The second regards the view that this Note takes as its target: the assumption that perjury is equivalent to lying. On its face, this is just a

basic truth. Lying and perjury are different in the same sense that any legal notion is different from any non-legal one, as where the legal concept of murder differs from the non-legal concept of murder. But many commentators have taken lying and perjury to be similar in important ways, for example by contemplating the conditions under which someone can be thought of as having lied in criticizing existing perjury law, or by relying on our intuitions about whether someone has perjured herself in establishing whether or not that person lied. The connection between the two is not taken to be window-dressing; instead, it does some persuasive work in motivating our intuitions or explaining steps in logic. In this sense, the connection people draw between perjury and lying is analogous to the connection some have drawn between contracts and promises.⁵ While supporters of promise theories of contracts may not mean that the two concepts are entirely interchangeable, we may still cogently debate the value of understanding a contract as essentially a promise.⁶ This Note attempts to call into question the value of understanding perjury essentially as lying, arguing that doing so requires making assumptions that are not borne out by the differences between the two contexts.

Third and finally, one might wonder at the outset whether this Note is more concerned with the *definition* of a lie or with its *moral* valence. I am concerned with both—the law imposes both strict definitions for crimes and a moral valence upon those crimes, and so it is worth fleshing out why philosophers think lying is wrong as well as what philosophers think constitutes a lie. Indeed, as I hope to show, one can inform the other. Our reasons for why lying is worse than deception, for example, can feed into our understanding of why lying is conceptually different from deception. As such, I do not distinctly separate out moral theory and philosophy of language concerning lying; I instead treat them as one unified body with which to make sense of some of these issues.

I. PHILOSOPHICAL APPROACHES TO LYING

In this Part, I discuss a set of philosophical puzzles surrounding the concept of lying and some attempts to make sense of those puzzles. My goal is not to endorse or refute any particular theory of lying, which would be an entirely separate undertaking. Instead, it is to identify particular issues that philosophers face in developing a coherent account of what constitutes a lie and to generally describe a set of promising paths toward providing such an account.

5. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

6. See generally, e.g., Randy E. Barnett, *Some Problems with Contract as Promise*, 77 *CORNELL L. REV.* 1022 (1992).

A. The Basic Problem

While we have all used the word “lie” as competent speakers of English, often without even thinking twice, it can be much more difficult to pin down exactly what is and is not a lie. Laurence Horn identifies four criteria that people tend to invoke in determining that speaker *S* lied to hearer *H*: *S* says or asserts that *p*; *S* believes that *p* is false; *p* is false; and *S* intends to deceive *H*.⁷ While these may be a set of *sufficient* criteria for labeling something as a lie, they are surely not all necessary.⁸ There seem to be possible lies that do not involve actual falsity, for example, or that do not require intent to deceive. Consequently, much of the philosophical literature on lying has centered on the question of how to create a truly accurate description of lying—one that does not simply capture the *most* egregious lies, but rather captures all statements or actions that we would ordinarily classify as lies. In other words, philosophers currently “pretty much agree that a lie is always an *insincere assertion*,” but disagree over what other necessary and sufficient components should be added to that core definition to truly capture the concept of lying.⁹

Paralleling the philosophical discussion, there is helpful linguistic research on the concept of lying. In particular, Linda Coleman and Paul Kay conducted a prototype analysis on LIE that attempted to account “for the obvious pretheoretical intuition that semantic categories frequently have blurry edges and allow degrees of membership.”¹⁰ Ideally, a prototype analysis reveals that certain manifestations of a word or concept are more central than others. Coleman and Kay conducted a series of experiments where they asked subjects whether a lie had been told in a variety of different situations, all of which included or excluded certain “standard” conditions for lying. They found confirmation that LIE does exhibit prototype-like effects, where people seemed to agree strongly on certain instances of potential lying but disagreed on less core examples. Even more interestingly, they found a consistent pattern in what conditions were more or less important to whether something counts as a lie. “[F]alsity of belief is the most important element of the prototype of *lie*, intended deception is the next most important element, and factual falsity is the least important.”¹¹

Some philosophers have engaged with this sort of prototype analysis as

7. Horn, *supra* note 3, at 2.

8. See *id.* (acknowledging that dictionary and theological definitions of lying often exclude one or more of these criteria).

9. Fallis, *supra* note 4, at 564.

10. Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26, 27 (1981); see also Karol J. Hardin, *The Spanish Notion of Lie: Revisiting Coleman and Kay*, 42 J. PRAGMATICS 3199 (2010) (discussing how this model may differ across cultures, specifically in the context of Spanish speakers).

11. Coleman & Kay, *supra* note 10, at 43.

illustrating “ordinary” engagement with the concept of lying.¹² For the most part, though, this linguistic analysis seems to occur separately from the philosophical discussion of lying—and to some extent this makes sense. Even if linguists can show—as Coleman and Kay may have—that LIE is a prototypical concept with blurry edges, we may still be interested in what defines the very outer edges of lying. In fact, this is probably the most useful inquiry regarding perjury law, where discussion often centers on the ‘hard cases’ rather than obvious instances of lying on the stand.

B. Hard Questions in the Philosophy of Lying

This section hones in on hard cases involving aspects of lying with which we continue to grapple. I discuss three fundamental questions. First, does lying only stem from assertion, rather than from implication—and if so, why should it? Second, must lying involve intent to deceive? And third, what is the relationship between a lie and the credibility of a speaker or utterance? I approach each of these issues with the goal of elucidating the primary questions and conflicts surrounding them, not to reach a definitive conclusion on any given point. Instead, by developing these issues, I hope to show that the relevant reasoning may differ in the case of perjury.

1. The Assertion-Implication Distinction

Almost universally, the literature on lying draws a distinction between lying and what I will call “mere deception,” on the grounds that lying involves false *assertion* while mere deception does not.¹³ In practice, this distinction between lying and deception unfolds on two levels. The first is between non-verbal deception and verbal deception. Take Immanuel Kant’s famous example of a person packing his luggage to convey the impression that he is going on a trip—Kant staunchly opposed lying, but concluded that this was not lying and was therefore an acceptable form of deception.¹⁴ Regarding this, some have persuasively questioned whether lying must involve assertion rather than simply some clearly understood structure of communication. For example, as David Simpson writes, “we don’t exactly need language each time we lie. What we need is the capacity for making our beliefs public and our sincerity in this mutually manifest.”¹⁵ But even these critiques concede that lying must occur within

12. See, e.g., Fallis, *supra* note 4, at 565.

13. The Note tables the question of what *other* components lying may entail above and beyond mere deception. At the very least, it seems that many believe that a deceptive non-assertion with all of the other components of lying may still not be a lie.

14. IMMANUEL KANT, LECTURES ON ETHICS 224-35 (Louis Infield ed., Hackett Publishing 1963); see Roderick M. Chisholm & Thomas D. Feehan, *The Intent to Deceive*, 74 J. PHIL. 143, 149 (1977).

15. David Simpson, *Lying, Liars and Language*, 52 PHIL. & PHENOMENOLOGICAL RES. 623, 630 (1992) (concluding that “nods, winks, and shoulder shrugs may suffice); see also BOK, *supra* note 4, at 13 (“[Assertions] can of course also be conveyed via smoke signals, Morse code, sign language, and

some systematized form of communication. Kant's suitcase-packer clearly intentionally leads the viewer to believe something specific, but does not do so in an obviously systematized way.

This brings me to the second distinction between lying and mere deception. Most seem to agree that lying must involve some kind of genuinely false assertion, rather than "asserting what one believes true, inviting the drawing of a conclusion that one believes false."¹⁶ Much of this discussion centers on the exploitation of Gricean maxims, implicit constraints on conversational structure that yield inferences about meaning that go beyond the surface level of words said.¹⁷ Here, the relevant unit of deception is not an action, but rather a statement that is strictly speaking truthful but clearly misleading in the given context. If you ask me where Joe is and I say that he has been hanging around the Nevada Diner a lot, my answer is taken as responsive to your particular question and therefore implies that Joe is, or is likely to be, at the Nevada.¹⁸ This distinction—between outright lying with language and merely misleading with language—is broadly accepted.¹⁹ Moreover, it is intuitive. Lying seems conceptually distinct from other kinds of deception—we really do seem to mean something different when we say that someone *lied* to us than we do if we say that someone *deceived* us but did not strictly speaking say anything untrue.²⁰ I will therefore not belabor the point that lying is generally treated as something more specific than deception writ large.

More controversial is the idea that lying is morally *worse* than mere deception, which is a fairly standard assumption in ethical thought.²¹ This ethical distinction is nothing new—theologians and philosophers have historically drawn a clear distinction between lying and less morally problematic forms of deception, enabling them to unequivocally morally condemn lying while still allowing for some degree of deception.²² This may be because they recognized that non-lying deception was a mundane

the like").

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

17. See generally H. Paul Grice, *Logic and Conversation*, in 3 SPEECH ARTS 41 (Cole et al. eds., 1975) (describing maxims that constrain conversation and generate 'implicatures' that go beyond the surface meaning of words uttered).

18. Adler, *supra* note 16, at 437-38.

19. Jörg Meibauer, *On Lying: Intentionality, Implicature, and Imprecision*, 8 INTERCULTURAL PRAGMATICS 277, 285-86 (2011), does not draw this distinction, but he is clearly in the minority. Meibauer cites the linguistic literature on the subject, see *supra* note 10, to justify the idea that implicatures should be subsumed under the category of lies.

20. See, e.g., D.S. Mannison, *Lying and Lies*, 47 AUSTRALASIAN J. PHIL. 132, 132 (2006).

21. See Adler, *supra* note 16, at 435 ("A powerful tradition in ethics maintains that lying is a significantly worse choice than other forms of deception."); Joseph Kupfer, *The Moral Presumption Against Lying*, 36 REV. METAPHYSICS 103, 104 (1982) ("[W]e seem to single lying out for special opprobrium").

22. See BOK, *supra* note 4, at 14. See generally Horn, *supra* note 3 (describing historical approaches to lying).

part of everyday life for most people, and it continues to be so today.²³

The interesting question is this: Even if lying (through assertion) and mere deception (through implication) are *conceptually* different, why should we treat them as *morally* different? Many accounts attempt to explain why lying is morally worse than merely deceiving. I discuss the main set of possibilities.

A first attempt is the argument that an assertion is different because it invites an entitlement to rely on the truth of what one says. The liar, in a sense, gets the victim to “place his faith” in the liar.²⁴ As such, “[l]ying, unlike the other types of intended deception, is essentially a breach of faith.”²⁵ The liar does this through the use of assertion, which—unlike other methods of communication—can be said to aim at truth.²⁶ In other words, the unique character of an assertion—as opposed to a Gricean implicature—is that we feel entitled to rely on assertion to an extent that we do not feel entitled to rely on implicature. In turn, when someone is caught in a misleading implicature, that person does not necessarily lose credibility about her willingness to engage in truthful assertions; the converse is not necessarily true.²⁷

Second, and relatedly, Jonathan Adler argues that lying is worse than merely misleading because in the case of misleading, part of the blame falls on the victim.²⁸ Because misleading does not involve a bare assertion of falsehood but rather requires the listener to draw her own inferences, the listener is ultimately complicit in being misled. As Adler vividly puts it: “[d]epending on the nature of the deception, the victim feels anything from foolish to tricked to corroded. Not only has he been misled, but the embarrassment or horror of it is that he has been duped into collaborating on his own harm.”²⁹ Of course, the converse of this is that the mere deceiver may also be regarded as “especially sleazy” *precisely because*

23. See Adler, *supra* note 16, at 435 (“Intentional deception is a constituent of many acceptable forms of everyday social life We treat putting on make-up or wearing a wig as ethically unproblematic, even when they are intentional deceptions.”).

24. Chisholm & Feehan, *supra* note 14, at 149.

25. *Id.* at 153.

26. BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS* 67 (2002). Some, like Simpson, draw a distinction here between the possibility that lying is “assertion plus the invocation of trust” and the possibility that “assertion itself involves this invocation of trust.” Simpson, *supra* note 15, at 627. Either way, the conclusion is that lying is different from deception because it leads to an invocation of trust.

27. Alan Strudler, *The Distinctive Wrong in Lying*, 13 *ETHICAL THEORY & MORAL PRACTICE* 171, 176 (2010). Paul Faulkner hypothesizes that this also “partly explains our poverty at identifying when we are being lied to,” in that we feel we ought believe speakers when they assert things since they are implicitly asking for our trust. Paul Faulkner, *Lying and Deceit*, in *INT’L ENCYCLOPEDIA OF ETHICS* 3101, 3109 (2013); see also Strudler, *supra*, at 175 (“[Y]ou cede more control to a person in trusting his assertion than in trusting his implicature . . . because you can handle doubt about an implicated proposition more readily than doubt about an asserted proposition.”)

28. See Adler, *supra* note 16, at 442.

29. *Id.*

she jointly constructs blame between herself and the listener.³⁰

Third, some have contested the idea that deception is morally better than lying in situations where you expect neither to be lied to nor to be deceived.³¹ Still others have made the sweeping claim that there is *no* general moral distinction between the two, but both deserve moral condemnation.³² One might think that lying indicates a greater moral deficiency on the part of the liar—either currently or in the future. Adler notes that the deceiver opts not to lie because of respect for morality, while the liar is “more brazen,” motivated more by the likelihood of success than by concern for avoiding morality’s dictates.³³ Moreover, as Sissela Bok argues, lies generate a slippery slope. “Psychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar’s perception of his chances of being caught may warp.”³⁴ As such, we are right not to trust the liar as much as we trust the mere deceiver, since the liar has indicated a current willingness and a future propensity to engage in similar actions.

An especially plausible iteration of this view, put forth by Jennifer Saul, holds that lying and merely misleading are morally equivalent in any given case, but that it is simultaneously possible to explain why we are inclined to treat them differently. Saul argues that while in individual cases, no moral preference can be justified for misleading statements over outright lies, there are other reasons to accept this moral distinction.³⁵ She argues: “As far as the acts go, misleading is not morally better than lying. But when we’re reflecting on the morality of the *acts*, we’re often reflecting as well on the virtuousness of the *actor*—without always being aware that we are doing this.”³⁶ As a result, “when we think about such cases, we often muddle together our thoughts about the morality of the acts and our thoughts about the morality of the agents—and that the latter often affects our judgment of the former.”³⁷ The choice to deceive may reflect higher regard for the truth than the choice to lie, and as such we may intuitively weight lying as morally worse for misleading, but Saul cautions that this does not necessarily reflect an actual moral difference between the two acts.³⁸

30. Horn, *supra* note 3, at 14.

31. See Strudler, *supra* note 27, at 177.

32. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 320 (1998) (arguing that there is no general moral difference between lying and other forms of deception).

33. Adler, *supra* note 16, at 441–42.

34. BOK, *supra* note 4, at 25; see also Adler, *supra* note 16, at 440 (claiming that lying is simply easier than deception).

35. See JENNIFER MATHER SAUL, LYING, MISLEADING, AND WHAT IS SAID: AN EXPLORATION IN PHILOSOPHY OF LANGUAGE AND IN ETHICS (2012), ch. 4.

36. *Id.* at 86.

37. *Id.* at 87.

38. *Id.* at 87–88. Saul acknowledges the strangeness caused by her position, in that once someone is “in the know,” then the choice to mislead rather than lie *no longer* reveals something about the

All of these rationales for why lying is morally worse than mere deception have something in common: they focus the wrongfulness of lying on how it affects or reflects a relation between speaker and listener. A fourth rationale instead has to do with the special value of assertion in a system of language, though I find it less plausible for reasons I will discuss. In order for a structure of language to exist, this logic goes, we need to be able to rely on the fact that others are telling the truth. This generates a “semantic rule requiring the assertion only of what is true.”³⁹ This approach seems intuitively compelling, but I find that it falls short for two fairly straightforward reasons. First, Jörg Meibauer makes the point that language is *not* typically constrained by the assumption that speakers try to tell the truth, as evidenced by “lies, jokes, fictions, metaphors, ironies, and more generally, so-called loose uses of language such as approximations and sense extensions.”⁴⁰ Indeed, analyzing any everyday conversation reveals that most conversations are not carried out through a straightforward series of assertions. Relatedly, one might also think that the use of implication is also fairly commonplace in our everyday interactions, to the point that there are certain clearly understood implications that may possess some of the same conventional properties as language.

In sum, while there is certainly disagreement on the specifics, most philosophers of lying tend to agree that lying involves *assertion of a falsehood*, while mere deception can rely on misleading action or implication. Moreover, most tend to agree that lying is somehow *worse* than mere deception as a result (though, as we have seen, this is not a unanimous conclusion). I have only sketched out some of the more popular theories about why this might be the case, but most of them seem to have a common theme. Specifically, they seem to hone in on the relationship between the liar and victim: a relationship of trust that is broken, a relationship of complicity in falsehood, or a relationship as moral actors. Part III returns to this discussion to see whether it also succeeds in underpinning a distinction between lying and misleading in the courtroom.

2. *Intent to Deceive*

Another thorny issue in the philosophy of lying involves whether a lie

speaker’s character. *Id.* at 94. But the argument still serves to motivate the intuition that in *many* cases, misleading reflects better on the speaker, even if it does not necessarily at every point.

39. Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn From Mill and Kant?*, 16 TANNER LECTURES ON HUMAN VALUES 307, 337 (1995). MacIntyre further argues that the liar breaks that rule, but depends for her effectiveness on others following the rule so that a structure of language exists which the liar can then warp to her advantage. *Id.* at 337; see also DAVID LEWIS, *LANGUAGES AND LANGUAGE* 10 (1975) (defining a language as in use by a population only if there is a “convention of truthfulness and trust”).

40. Meibauer, *supra* note 19, at 288.

must intend to deceive the listener. Two types of statements motivate concerns about intent to deceive, but pull in opposite directions. The first are statements that are literally false, but have a clear true implicit meaning. The second are what are commonly known in the literature as “bald-faced lies.”

Let us start with non-literal statements. If we are committed to the distinction between assertion and implication, then metaphor, irony, and the like may pose a problem for any account of lying that does *not* treat intent to deceive as a constituent component of lying. Perhaps certain non-literal usages of language are so commonplace that they essentially take on a different meaning (consider “I’m so hungry I could eat a horse”). But certainly something like sarcasm cannot be explained in this way, nor can many less common figurative uses of language. So, when *A* says something obvious and *B* says “I *never* would have guessed that,” *B* seems to be knowingly uttering a false statement—but does not clearly seem to have lied. This has driven some to conclude that intent to deceive *must* be a core component of lying.⁴¹ Others, like Horn, conclude that the correct approach is to more narrowly define ‘assertion’ to exclude these non-literal uses of language; this generates the attendant challenge of not excluding nonverbal forms of communication.⁴²

At the same time, a second group of statements—characterized as “bald-faced lies”—seem to belie that intent to deceive is a constituent component of lying. A bald-faced lie is “an undisguised lie, one where a speaker states that *p* when she believes that *p* is false and it is common knowledge that what is being stated does not reflect what the speaker actually believes.”⁴³ A quintessential example of a bald-faced lie comes from Thomas Carson. A student is called into his Dean’s office for plagiarism and is asked whether he plagiarized on the relevant assignment. He knows that the Dean will not believe him if he says no, but lies about not having cheated regardless.⁴⁴ Here, it seems that the student has lied—but *not* that the student intends to deceive the Dean, since the Dean and student both know that the student’s denial will not convince the Dean

41. See, e.g., Keiser, *supra* note 4, at 463.

42. Horn, *supra* note 3, at 6; see WILLIAMS, *supra* note 26, at 99 (concluding that certain metaphor is simply part of the meaning of an assertion).

43. Lackey, *supra* note 4, at 238.

44. Thomas Carson, *The Definition of Lying*, 40 NOUS 284, 290 (2006). Carson provides a second commonly-used example where a scared witness lies to protect herself, but knows that no one in the courtroom will believe her. *Id.* I will table that example for the time being so as not to muddy the waters due to its connection to perjury, but it has prompted an interesting discussion whether the witness actually intends to deceive the jury in that case, or whether deceiving the jury is simply a ‘side effect’ of the witness’s desire to avoid negative repercussions. Gary Jones, for example, argues that “the witness manifested an intention to deceive by the mere fact that he testified falsely, his inner feelings notwithstanding.” Gary E. Jones, *Lying and Intentions*, 5 J. BUS. ETHICS 347, 348 (1986) (citing contract law as support for the idea that outwardly manifested intentions are more important than secret inner intentions when determining the impact of one’s words).

otherwise.

As a result, there is much debate over whether a bald-faced lie is or is not, in fact, a lie. Some abandon the intent-to-deceive condition on lying, arguing that a bald-faced lie *is* a lie, and even one with similar moral valence to “conventional” lies. Don Fallis, for example, argues that “the fact that a lie does not fool anyone does not mean that it does not diminish trust [W]e might legitimately worry that [the liar] will also be willing to violate this norm when it is *not* common knowledge that she is doing so.”⁴⁵ Others point out that it is difficult to completely abandon the intent-to-deceive condition, since this generates a quandary when it comes to non-literal speech of the sort discussed above.⁴⁶ As a result, the philosophical community seems to be genuinely split. While some⁴⁷ work to incorporate bald-faced lies into their syntheses of lying, others⁴⁸ reject the very idea that bald-faced lies count as lies. Either way, Meibauer provides a neat illustration of why we may be so quick to equate “regular” lies and bald-faced lies, even if they are not actually the same: it “may have to do with the fact that lies and [the insults generated by bald-faced lies] share a certain property, namely breach of trust.”⁴⁹

Again, my goal here is certainly not to resolve whether or not bald-faced lies qualify as lies. It is enough to demonstrate that this is a tricky issue in the philosophy of lying, and perhaps that bald-faced lies should not be automatically equated with ‘genuine’ lies. In Part III, I will return to this issue when I discuss how the law of perjury deals with intent to deceive—as I hope to show, the law approaches the issue with less nuance than this tangled discussion would seem to require.

3. *Speaker or Utterance Credibility*

Finally, a coherent theory of lying must account for differences in credibility between different speakers and different utterances. In some ways, this is a hybrid concern merging the idea that the wrongfulness of lying is established through the relationship between a speaker and listener (from the discussion of the assertion-implication distinction) with the issue of bald-faced lying. The gist of the concern is that philosophers of lying treat as a hard question whether someone’s ability to “cancel” her own credibility undermines the force of a determination that she then lied.

45. Don Fallis, *Are Bald Faced Lies Deceptive After All?*, 28 *RATIO* 81, 94 (2015).

46. Keiser, *supra* note 4, at 463 (“The difficulty with this strategy is that the intent-to-deceive condition seems to be a crucial component in distinguishing lying from certain forms of non-literal speech” like metaphor.). Of course, we could always follow Horn’s approach of not treating non-literal speech as assertions at all, but that would then exclude a broad swathe of common language from the purview of lying.

47. *E.g.*, Carson, *supra* note 44.

48. *See* Faulkner, *supra* note 27, at 3106; Keiser, *supra* note 4, at 462; Meibauer, *supra* note 19, at 145-46.

49. Meibauer, *supra* note 19, at 146.

Recall the question of interpreting lying as a “breach of faith.”⁵⁰ This raises the question of what happens when a lie *truly is not* a breach of faith because the listener never felt entitled to rely on the speaker in the first place. This scenario generates two difficulties. The first is that it is hard to tell the same story about the harm of lying when the listener was never reliant on the truth of the speaker’s statement to begin with. Perhaps here, one could argue that this in itself is insulting—even if I expect someone to lie to me, the story would go, I may still be hurt or offended when they do. That might make sense in the case of speakers who are generally not credible. But it does not tell us what to do in the case of “cancellation”⁵¹—how to treat a situation where a person downplays her own credibility and then makes a false statement.

Fallis provides an example (in a courtroom context, though it is generalizable) of a case where someone cancels her own credibility in conjunction with knowingly making a false statement: suppose that a witness says “Tony was with me at the time of the murder,” but then follows that by saying “Of course, you know I am really bad with dates and times.”⁵² Fallis intends to criticize a specific ‘warranting’ account of lying,⁵³ but his point raises a more generalizable concern. If someone “cancels” the validity of her remarks, we presumably are entitled to hold her responsible for accurately reporting what she believes to be the case, even if we cannot rely on her statement as much as we might like. One might think that the issue then becomes whether the speaker has accurately reported her own thoughts or impressions.⁵⁴ This seems like a sensible approach in cases where a speaker explicitly says “I have a bad memory, but I think this is what happened”—or other similar quasi-cancellations of individual statements. But consider other cases where a speaker explicitly downplays her credibility at one point in time, but then later in the conversation makes a straightforward statement that seems to be reporting a *factual state of affairs about the world*, not a belief. Alternately, consider cases where a speaker expresses mere belief about something, but leads the listener to believe that her conception of affairs is accurate.

Any successful account of lying must be sensitive to these concerns as well. It either must conclude that when a speaker “cancels” her credibility then there is no lie (an implausible view), or develop a theory of lying that

50. See, e.g., Chisholm & Feehan, *supra* note 14, at 149.

51. This is my term, not a term of art in the literature. I mean it to apply to instances where an assertion becomes less credible as a result of another utterance by the same speaker.

52. Don Fallis, *What is Lying?*, 106 J. PHIL. 29 (forthcoming 2009) (manuscript at 26); see also Lackey, *supra* note 4, at 246 (“Betty is cheating on you, but don’t take my word for it”).

53. See generally, e.g., Carson, *supra* note 44 (presenting a warranting account of lying).

54. This is what Fallis concludes about the Tony example: “it still seems that [the witness] intends to be taken seriously as having expressed what he believes to be the case.” Fallis, *supra* note 52, at *26.

does not depend on breach of trust or possibility of deception. As best as I can tell, the discussion of these sorts of situations has primarily targeted “warranting” accounts of lying, and there has been limited discussion beyond that issue. As such, I will not go further in developing this issue here, but will instead treat it as an unsettled area in the philosophy of lying. In short, when a speaker’s credibility is called into question, this puts the listener more on guard regarding the veracity of the speaker’s statements. But at the same time, it does not eliminate the possibility that the speaker might have lied.

C. *The Importance of Context*

Thus far, I have made passing reference to a number of accounts of lying. There are many more than the ones I discuss.⁵⁵ Most of these theories have been individually debunked in one way or another, which is how the philosophical discussion of lying may continue in full force. Ultimately, though, many explicitly or implicitly recognize a core principle: To develop a coherent account of lying, we must be sensitive to the idea of context and incorporate it into the theory in some way. For instance, Bernard Williams notes that “[h]ow far people may reasonably rely on the implicatures and presuppositions of assertions, and more generally on what they imply . . . is a matter of the particular relations between these people and the speaker.”⁵⁶ There are two different ways to cash this out: either interpersonal relations determine whether something even *counts as a lie* (because, for instance, one may know that one is not entitled to rely on a certain speaker), or those relations establish the *moral harm* of a given lie.

Any answer to the first point (about what counts as a lie) depends on one’s views on bald-faced lies and their status, among other things. The second point, though, seems obviously true. The degree of interpersonal relation involved can quite clearly affect the moral harm of a lie relative to other offenses like mere deception. As Alan Strudler puts it:

Sometimes misleading is so treacherous that lying seems no worse. This may happen in contexts of maximal trust, for example, when a physician misleads a desperate patient about the risks of surgery, or a prospective spouse in solemn tones misleads his or her partner about willingness to have children. In contexts of maximal trust, misleading is maximally wrong, and so lying is no worse.⁵⁷

In Part III, I flesh out the importance of context. For now, this concludes a survey of the wealth of complexities surrounding the issue of lying and

55. See generally Lackey, *supra* note 4 (discussing prominent accounts).

56. WILLIAMS, *supra* note 26, at 113.

57. Strudler, *supra* note 27, at 177.

the difficulties with any attempt to systematically explicate that concept.

II. PUTTING THE LIE TO THE EQUIVALENCE BETWEEN LYING AND PERJURY

After providing a brief summary of the current statutory setup, I walk through the above issues—the assertion-implication distinction, intent to deceive, and speaker credibility—and analyze them in the context of perjury. This is not a straightforward task, since there are no straightforward conclusions on any of these issues. Instead, I show that the *sort* of reasoning that applies in the context of perjury is fundamentally different from the sort of reasoning that applies to lying writ large.

A. The Law of Perjury

To begin, it is worth clarifying the basic status of the federal laws surrounding perjury.⁵⁸ Importantly, in its 2012 decision in *United States v. Alvarez*, a majority of the Supreme Court made clear that the First Amendment protects⁵⁹ at least some intentional falsehoods from government sanction. Even prior to 2012, however, the law’s approach to perjury was not grounded in general principles regulating lying, but rather in a network of statutes covering specific activities relevant to the judicial system. Conventionally, the elements of perjury are broken down into four components: an oath, intent, a false statement, and materiality.⁶⁰

The trio of federal perjury statutes is codified in 18 U.S.C. §§ 1621-1623.⁶¹ Section 1621 prohibits taking an oath to speak or write truthful testimony and then “willfully and contrary to such oath stat[ing] or subscrib[ing] any material matter which [the speaker] does not believe to be true,” among other limitations.⁶² Section 1622 prohibits “procur[ing] another to commit any perjury,” under threat of subornation of perjury.⁶³

58. I focus on federal law because it is most broadly applicable and also most frequently discussed in the literature.

59. See *United States v. Alvarez*, 132 S. Ct. 2537 (2012). *Alvarez* concerned the Stolen Valor Act of 2005, 18 U.S.C. § 704, which imposed federal criminal penalties for lying about receiving military awards. A divided majority of the Supreme Court held that the Stolen Valor Act unconstitutionally violated the First Amendment. The plurality opinion, authored by Justice Kennedy, would extend strict scrutiny to the Stolen Valor Act as a content-based regulation on speech, and concluded that the Stolen Valor Act impermissibly targeted speech by virtue of its falsity. See *id.* at 2543-47. Justices Breyer and Kagan concurred only in the judgment, concluding that only intermediate scrutiny was warranted and that there might be a number of cases in which the government could permissibly regulate falsehoods. See *id.* at 2551-52 (Breyer, J., concurring).

60. See, e.g., Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397, 402 (2003-2004) (also discussing a body of case law interpreting each of these requirements).

61. Federal law also includes a false statements statute codified in 18 U.S.C. § 1001, among other perjury-like provisions elsewhere. This statute “has sometimes been interpreted as perjury and other times as fraud—depending on the operative statutory provision at issue, the court presiding, and the underlying facts of the case.” Green, *supra* note 1, at 191.

62. 18 U.S.C. § 1621.

63. 18 U.S.C. § 1622.

Finally, Section 1623 provides what we might normally think of as a basic prohibition against perjury: It prohibits “knowingly” making a “false material declaration” under oath “in any proceeding before or ancillary to any court or grand jury of the United States.”⁶⁴ That section also provides a more detailed outline of what might constitute proof of having made a false material declaration. For example, it provides for conviction in the case of inconsistent statements, where one of them must have been false even if it was impossible to tell which one.⁶⁵ It also provides for a limited privilege of recantation where someone admits a declaration to be false from earlier in the same proceeding that did not already substantially affect the proceeding (provided that “it has not become manifest that such falsity has been or will be exposed”).⁶⁶ There are, interestingly, some inconsistencies between the two “direct” perjury statutes—Sections 1621 and 1623—that yield paradoxical results in certain cases. As one example, Section 1623 allows for a recantation defense but Section 1621 does not, so a perjurer may have conflicting incentives to recant false testimony.⁶⁷

For these reasons and others, the federal law of perjury has been described as a “maze-like path that thwarts a prosecutor’s efforts to obtain truth and a defendant’s ability to tell it.”⁶⁸ Complicating the matter, perjury law does not inherently target all falsehoods—even intentional falsehoods—that occur in the course of an official proceeding. Instead, “[m]inor or marginally relevant misstatements, even if intentional, are unlikely to undermine the integrity of the governmental process, and thus fall outside the scope of the criminal law.”⁶⁹ The result is that perjury is incredibly difficult to prosecute—at one point, only eighty-seven of fifty thousand criminal cases initiated by federal prosecutors involved perjury.⁷⁰

Beyond the plain statutory text, federal perjury law has been further developed by an interesting body of case law. I will now further explain the status of American federal perjury law, but will do so with an eye toward directly comparing perjury with the accounts of lying discussed above.

64. 18 U.S.C. § 1623.

65. 18 U.S.C. § 1623(c).

66. 18 U.S.C. § 1623(d).

67. See Harrison, *supra* note 60, at 422.

68. *Id.* at 423.

69. LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* 213 (2005).

70. Roberto Suro & Bill Miller, *Perjury: A Tough Case to Make*, WASH. POST, Sept. 24, 1998, at A14; see also Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1768 (1996) (noting that few perjurers or suborners of perjury actually are punished). But see Joseph F. Savage & Matthew A. Martel, *Perjury Prosecutions—Not Just for Liars Anymore*, 13 WHITE-COLLAR CRIME Rep. 1, 1 (1999) (“Concerns about perjury, its limits, and how to counsel clients are increasing due to recent court decisions, aggressive perjury prosecutions, and the continued efforts by some Department of Justice attorneys to contact represented parties directly.”).

B. Puzzles in Lying Applied to Perjury

The bulk of this Section focuses on the assertion-implication distinction, since that is a site of lively debate both in the domain of perjury and in the domain of lying. It then turns briefly to the issues of an intent-to-deceive requirement and speaker credibility.

1. Revisiting the Assertion-Implication Distinction

As we have seen, a key distinction between lying and mere deception is that *lying* involves false assertion, while mere deception may involve action or implication. Perjury law also distinguishes between different types of statements, both by imposing a materiality requirement and by imposing a “literal truth” rule that parallels the assertion-implication distinction in the philosophy of lying.

To begin, perjury law clearly does not treat all assertions alike. Instead it requires that the offending statement be material. This generally requires that a statement have “the capacity or tendency to influence the decision of the tribunal or inquiring or investigative body, or to impede the proceeding, with respect to matters which such tribunal or body is competent to consider.”⁷¹ In other words, “[i]f the false statement relates to a minor matter or something that is unlikely to influence a trial or other official proceeding, it does not constitute perjury, even though we might still call the statement a lie.”⁷² Materiality may shift depending on whether the proceeding in question is a grand jury proceeding—which has an investigative function—or a trial.⁷³

Of course, the materiality requirement does not inherently indicate a tension between perjury and lying. It may be that built into the perjury statutes is a judgment that certain lies simply are not worth prosecuting, and nonmaterial lies fall within that category. This is not inconsistent with the way we might conceive of ordinary lies—some lies may not have the same negative moral valence associated with lying in general. D.S. Mannison argues, for instance, that lying and deception can both be clearly divorced from morality, as in the case of “white lies” or “pulling one’s leg.”⁷⁴ It does not seem unreasonable that the law may choose to regard nonmaterial false statements as the legal equivalent of white lies.

Beyond the issue of materiality, the law of perjury also presents interesting questions involving the assertion-implication distinction. These issues are best seen through the lens of a pair of cases, *Bronston v. United*

71. Michael Jay Kaplan, *Determination of Materiality of Allegedly Perjurious Testimony in Prosecution Under 18 U.S.C.A. § 1621*, 1622, 22 A.L.R. FED. 379 (1975).

72. SOLAN & TIERSMA, *supra* note 69, at 212-13.

73. Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 729 (1998).

74. Mannison, *supra* note 20, at 144.

*States*⁷⁵ and *United States v. DeZarn*,⁷⁶ which reveal the complications underpinning the role of assertion within perjury law.

Bronston concerned a perjury conviction under 18 U.S.C. § 1621 for the owner and president of a production company, who had previously testified at that company's bankruptcy hearing. His testimony included an exchange where he was asked whether he had ever had any bank accounts in Swiss banks, and replied "The company had an account there for about six months, in Zurich."⁷⁷ The questioner did not follow-up on that point, presumably taking this as a denial that Bronston himself had ever had money in Swiss banks. In fact, Bronston once had an account in Geneva. As such, his answer exploited the ordinary norms of conversation by *implying* that he was answering the question presented rather than presenting a totally off-base response. As Lawrence Solan and Peter Tiersma put it, "[t]he only way to make sense of the response is to assume that Bronston was communicating that he had no personal bank accounts in Switzerland, but that—in an effort to be as helpful as possible—he volunteered the unrequested information that his company once had such an account."⁷⁸

The Supreme Court, in evaluating the case, conceded that there was "a serious literal problem in applying § 1621 to [Bronston]'s answer."⁷⁹ At the same time, it conceded that in casual conversation one might reasonably draw the interpretation that Bronston had never had an account in a Swiss bank. This implication was not enough to sustain Bronston's perjury conviction. Instead, the Court placed the blame for the potential confusion squarely on the shoulders of the questioning attorney:

Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mar, to flush out the whole truth with the tools of adversary examination.⁸⁰

This has since been interpreted as the "literal truth" rule—in effect

75. 409 U.S. 352 (1973).

76. 157 F.3d 1042 (6th Cir. 1998).

77. 409 U.S. at 354.

78. SOLAN & TIERSMA, *supra* note 69, at 214.

79. 409 U.S. at 357.

80. 409 U.S. at 358-59.

imposing on perjury the same emphasis on assertion that philosophers impose on their analyses of lying. If this were the extent of the law, then it might indicate a strong connection between perjury and lying.

But the story does not stop there. Over a decade later, the Sixth Circuit handed down a decision in *DeZarn* that seemed to substantially constrain *Bronston*'s literal truth rule.⁸¹ During an investigation of corruption by a Kentucky governor, DeZarn was called as a witness. Prior to his testimony, DeZarn had attended two parties held at the home of one Billy Wellman. The first, held in May 1990, was a "Preakness Party" that hosted sixty guests and overtly collected campaign contributions from attendees. The second, held in June 1991, was a small dinner party attended by six people that involved no campaign contributions or campaigning. DeZarn was called upon to address allegations that people who donated to the gubernatorial campaign at the Preakness Party received special treatment in job positions. His questioner, however, mistakenly asked whether campaign activities had occurred at the 1991 Preakness Party. DeZarn emphatically denied that possibility.⁸² At the same time, he answered other questions about the '1991 Preakness Party'—a small, intimate event—as if it were a large affair where he did not know everyone who attended.⁸³

The Sixth Circuit was asked to determine whether DeZarn's answers constituted perjury. It concluded that given the case's context, it would be "reasonable to expect that DeZarn understood that the questions posed to him concerned the 1990 party."⁸⁴ After all, Wellman's only *Preakness Party* was held in 1990, not 1991; moreover, it was unreasonable that DeZarn would not have remembered whether or not the governor was in attendance at an intimate six-person dinner party. With that in mind, the court turned to address DeZarn's literal truth defense. This seemed like a bit of a quandary, since DeZarn's testimony was ostensibly literally true—there was no fundraising that he could have observed at the 1991 party. Aware of this, the Sixth Circuit argued that unlike *Bronston*'s unresponsive answer to the question of whether he had ever personally kept money in Swiss banks, DeZarn "gave unequivocal and directly and fully responsive answers," and "there [w]as more than ample context and evidence to test the meaning and falsity of DeZarn's answers."⁸⁵ As such, the court found that DeZarn could not defend himself from perjury

81. While much of the discussion seems to focus on *DeZarn*, other courts beside the Sixth Circuit certainly do interpret *Bronston* as applying to "unresponsive but 'literally truthful' answers" only. See, e.g., *U.S. v. Corr*, 543 F.2d 1042, 1048 (2d Cir. 1976).

82. *United States v. DeZarn*, 157 F.3d 1042, 1044-45 (6th Cir. 1998).

83. *Id.*

84. *Id.* at 1049 (internal quotation omitted).

85. *Id.* at 1051.

charges through the literal truth defense,⁸⁶ and ultimately sustained his conviction.⁸⁷

These cases raise several issues. The first is what the holdings of the cases actually *are*. *Bronston* is fairly definitively understood as setting up a literal truth rule of some sort, and as delineating that in the courtroom, the onus is on the questioning attorney to determine whether a witness is being uncooperative. But what literal truth rule does it actually promote? Solan and Tiersma point out the *Bronston* court's conclusion regarding numerical answers.⁸⁸ There, the Supreme Court seems to acknowledge that it *would* be perjury to baldly answer that I entered a store five times on a given day when I had actually entered it fifty times. The Court concludes that because such an answer would be directly responsive to the question, it would contain "nothing to alert the listener that he may be sidetracked."⁸⁹ This yields the interesting conclusion that "[w]hether an answer is true must be determined with reference to the question it purports to answer, not in isolation An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question."⁹⁰ By this logic, the Sixth Circuit's reasoning in *DeZarn* seems like a natural limitation on *Bronston*'s literal truth rule. And moreover, as Solan and Tiersma point out, *DeZarn*'s conviction was "consistent with the plain language of the perjury statute, which requires only that the defendant 'willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true.'"⁹¹ Yet an alternate reading of *DeZarn*'s reasoning—if not its explicit holding—is that *DeZarn* simply gave inconsistent testimony and therefore *had* to have been lying at one point or another. One might therefore think that the *DeZarn* court got the answer right, even if one also disagrees with *DeZarn*'s limitation on the literal truth rule.

This yields two follow-up questions. One is whether the *Bronston-DeZarn* literal truth rule—one that allows literal truth as a defense for nonresponsive questions but not for responsive ones—places perjury

86. *Id.*

87. *Id.* at 1054.

88. See SOLAN & TIERSMA, *supra* note 69, at 216-17.

89. *Bronston v. U.S.*, 409 U.S. 352, 355 n.3 (1973).

90. *Id.* It may be that the particular conclusion the Supreme Court reaches on numerical implicature is simply consistent with the linguistic conclusion that numerical implicatures may function differently from other forms of implicature. See Peter Meijes Tiersma, *The Language of Perjury: 'Literal Truth,' Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 397-98 (1990); see also M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 384 (1985) (discussing how conventional numerical pragmatics dissipate during witness cross-examination). See generally Thorstein Fretheim, *The Effect of Intonation on a Type of Scalar Implicature*, 18 J. PRAGMATICS 1 (1992) (discussing, among other things, how direct numerical responses seem to include upper bounds).

91. SOLAN & TIERSMA, *supra* note 69, at 219.

further from or closer to our concept of lying. But more fundamentally, we might also wonder whether *any* kind of literal truth rule in perjury is sustainable, and if so, whether it is sustainable for the same reasons that one might endorse a literal truth rule in an account of lying. I will address each issue in turn.

Solan and Tiersma present a compelling analysis of why the *Bronston-DeZarn* literal truth rule makes sense, even when accounting for our intuitions about lying and assertion. For them, the key point is that in general, conversation turns on context—“we do not normally interpret spoken utterances literally or in isolation of the context.”⁹² Instead, “a witness’s answers are virtually always understood in the context of the question, which in turn is understood in the context of the entire line of questioning and all kinds of other pragmatic information.”⁹³ The net result is that responsive answers simply do come with baggage determining what exactly they mean, and some of that baggage involves implicature. Tiersma emphasizes this elsewhere (though he ultimately does not endorse the literal truth rule at all): “[T]he Court’s holding [in *Bronston*] can only make sense if the literal truth of Bronston’s statement is judged completely in isolation—without considering the context of the question to which it supposedly responded.”⁹⁴ This is nigh impossible when a question is actually responsive.

Does this distinction between responsive and unresponsive answers conform to our concept of lying? The answer is both yes and no. In one sense, responsive answers with clear implications leave *more* room for us to incorporate those implications into the meaning of an utterance. This is probably close to what Williams meant when he wrote that “there are other cases in which a sentence is indeed used to make an assertion, though its content cannot simply be recovered from its words.”⁹⁵ On the other hand, many would be happy to concede that even a fully responsive answer would not count as a lie if the only falsehood was simply *implied* but not outright asserted.⁹⁶ So we see that the relevant holding in *DeZarn*—that the literal truth defense does not apply to responsive

92. *Id.* at 221.

93. *Id.*

94. Tiersma, *supra* note 90, at 385.

95. WILLIAMS, *supra* note 26, at 98-99. Williams tells the apocryphal story of a philosopher who was asked by his wife to watch the soup and simply stared intently at it as it boiled over. “He said that he had done what she asked, but if we agree that he failed to do that, too, should we say that this was because he wrongly took what she said *literally*?” *Id.*

96. See, for example, Adler’s misleading but non-lying statement that Joe has been hanging around the Nevada Diner a lot, in response to a question about where someone can find Joe. Adler, *supra* note 16, at 437-38. This is distinct from the nonresponsive answer in *Bronston* because it cannot be construed as endeavoring to provide helpful *additional* information that is not directly related to the question being asked. In *Bronston*, conversely, the eponymous defendant could be understood as saying that he had *not* had money in Swiss banks and then adding additional information to the conversation about his company’s finances.

statements—does not mesh fully with contemporary accounts of lying.

Of course, to this point I have assumed that the literal truth defense in perjury is tenable as a general principle, whether or not it is further constrained by the holding in *DeZarn*. This is a live issue in legal theory, and one that I do not pretend to be able to resolve fully, but the discussion is highly illuminative of some differences between perjury and lying. In particular, I will discuss two competing defenses of the literal truth rule in perjury, and evaluate the lessons to be learned from each.⁹⁷

Stuart Green addresses this issue head-on, arguing both that the *Bronston* court's reasoning about literal truth is similar to arguments regarding the moral status of lying⁹⁸ and that *DeZarn* does not conform to dictates of "everyday morality" because it blurs the distinction between lying and merely misleading.⁹⁹ Green focuses primarily on the principle of "caveat auditor"—listener beware—which he claims applies differently to straight-out assertions than it does to implications.¹⁰⁰ At times, Green explicitly adopts a "warranting" account whereby the primary moral wrongfulness of lying is cashed out in the breach of trust between a listener and a speaker.¹⁰¹ Following this principle, Green endorses a sweeping version of the *Bronston* literal truth rule and questions *DeZarn*'s limitations on that rule.

This approach does not seem quite right to me—and indeed, Green's argument seems to demonstrate some of the pitfalls of applying the logic of lying to the logic of perjury. Specifically, it is hard to see what the relationship of trust is between a witness on the stand and her audience. Is it trust that she will be as open as possible? Is it trust that she will directly and truthfully answer questions posed? It is not clear why we are entitled to have such trust (of either sort) given the nature of the cross-examination process. Unlike ordinary conversation, a cross-examination is a contrived

97. Not everyone defends the literal truth rule. Tiersma has argued that the literal truth rule is "indefensible as a linguistic matter and, because it permits the most clever perjurers to go free, cannot be justified on public policy grounds." Tiersma, *supra* note 90, at 393. He offers a series of attacks of the literal truth rule both in theory and practice. *Id.* at 400-01. One of his most compelling lines of analysis involves a set of basic problems with determining literal truth in the first place. Tiersma argues that we *must* look to context to determine what a speaker means by particular words, so there is no principled way in which to apply context to these meanings without applying context to interpret the statement as a whole. *Id.* at 407-08. This attacks the very idea of separating assertion out from other forms of communication, and may be just as relevant to the philosophy of lying as it is to the field of perjury. Given that the literal truth rule exists as a matter of doctrine in perjury law and exists as a matter of rough consensus in the philosophy of lying, however, I will primarily focus on those who *defend* that distinction in the context of perjury.

98. Green, *supra* note 1, at 177. Green does not explicitly argue that committing perjury *is* lying. See *id.* at 160 (referring to a "parallel" between perjury and lying). His critique of perjury law, however, effectively tracks concepts surrounding lying. See *id.* at 179-80.

99. *Id.* at 180.

100. *Id.* at 165.

101. *Id.* at 166 ("There is thus no warranty of truth that B could rely on" when A merely misleads B without asserting anything).

scenario, occasionally where each side is trying to outsmart the other.¹⁰² It is unclear why this kind of situation generates a warranty of truthfulness of the sort Green seems to assume exists.

Perhaps the issue is that the witness swore an oath (as Tiersma emphasizes, to tell not just the truth but the *whole* truth).¹⁰³ But again, it is not clear why the mere swearing of an oath should generate the relevant condition of trust. If the answer is that a witness is afraid of a perjury conviction, so she has an incentive to be truthful, that seems circular. To make that point, one would need to argue that when a witness makes direct and unambiguous statements (somehow as opposed to mere implications), those are warranted by the threat of perjury conviction—but when a witness commits perjury, clearly the threat of perjury conviction was insufficient to warrant her statements in the first place.

The basic point is that when we flesh out the literal truth defense in the context of *perjury*, the idea of trust between the speaker and the listener does not seem to carry through as clearly. Green's syllogism seems to be something like this: lying involves an invocation of trust, which is what differentiates lies from mere deception. Witness testimony also involves an invocation of trust, so the law governing witness testimony should also feature a distinction between false assertions and false implications. That middle step—that witness testimony really does involve an invocation of trust—seems to me to be missing. That assumption seems to stem from an unhelpful equation between the lying and perjury contexts.¹⁰⁴ Green's approach therefore indicates the importance of drawing a clear distinction between perjury and lying if they are not in fact closely related. If they are not equivalent, then we should be wary of drawing analogies from one to the other to justify substantive conclusions, especially when those conclusions may shape how we evaluate the relevant doctrines.

Recall why the invocation-of-trust argument for the moral difference between lying and mere deception fails in the case of perjury: there is no real trust to be broken.¹⁰⁵ The other rationales for lying's literal truth rule seem to fail in the case of perjury for similar reasons. Consider the idea that lying is worse than mere deception because the victim is complicit in the deception but not in the lie. This seems true in the context of ordinary conversation, but is less clear in the context of perjury, where the audience (if it takes its role seriously) must be acutely aware of its responsibility to scrutinize a witness's statements at every turn. Consider as well the

102. See generally, e.g., Lawrence M. Solan, *Lawyers as Insincere (But Truthful) Actors*, 36 J. LEGAL PROF. 487 (2012) (describing this sort of dynamic). Alan Strudler also offers a discussion of how trust dynamics in the courtroom mean that the questioner is not entitled to any more than the literal truth—when you regard someone as an adversary, you cannot be expected to cooperate with them. Alan Strudler, *Deception Unraveled*, 102 J. PHIL. 458, 462 (2005).

103. Tiersma, *supra* note 90, at 395.

104. See *supra* Section I.C.

105. See *supra* notes 24-27 and accompanying text.

argument that lying is worse than mere deception because it indicates something general about the liar's moral character. In the case of perjury, a would-be-perjurer could refrain *solely* because she is afraid of legal consequences; her decision to be truthful does not necessarily indicate anything at all about her character. Finally, I have already provided reason to think that there is no particular value to language that renders truth in assertion more important than truth in implication.¹⁰⁶ But beyond those issues, if the value of assertion were truly what motivates the literal truth rule in the perjury context, it is hard to see why other crimes of language would not adopt a similar stance. Yet in the case of fraud, for example, the focus is not just on literal truth but also on the perlocutionary effects of a statement upon the listener.¹⁰⁷

Beyond these options, Solan and Tiersma offer an alternate route toward arguing for the literal truth rule. They present three reasons why the literal truth defense should apply in the case of perjury (even when, as they note, "courts take a much less literal approach to other language crimes").¹⁰⁸ First, the structure of questioning witnesses is such that lawyers have ample opportunities to systematically clarify ambiguities, which is not the case in ordinary conversation. As such, in the courtroom it is more appropriate to hold the questioner responsible for clarifying those ambiguities.¹⁰⁹ Second, lawyers have far more power in the questioning arrangement—they can adjust the train of questioning to create misleading impressions from witnesses' answers, so "[i]t would skew the power relationship between lawyer and witness even more if witnesses could be prosecuted for creating a misleading impression in a dialogue in which the questioner is doing exactly the same thing."¹¹⁰ And third, oftentimes the point of questioning is less to acquire truthful information and more to create a coherent narrative, so the witness should not be held responsible for cases where a lawyer declines to follow up on a particular line of questioning.¹¹¹ In sum, the *Bronston* holding's "placement of primary responsibility on examining lawyers is an important safeguard against advantaging those in the legal system who would rather let a witness look

106. See *supra* notes 39-40 and accompanying text.

107. See generally Green, *supra* note 1 (describing the distinction between the crime of perjury and other possible crimes of deceptive language). Saul also makes an interesting observation about the role that context can play in other language crimes: "the law makes a sharp distinction between courtroom contexts and other ones, when it comes to the importance of literal meaning." SAUL, *supra* note 35, at 96. She gives the example of a criminal who tells witnesses that "[i]f they say anything to the police, 'something is going to happen to them,'" which if taken literally is just an obvious truth and not much of a threat at all. *Id.* at 96. Instead, "[t]aken in context, a threat is clearly meant and understood, and it does not matter that this threat is not literally said."

108. SOLAN & TIERSMA, *supra* note 69, at 215.

109. *Id.* at 215-16.

110. *Id.* at 216. See generally Solan, *supra* note 102, at 490 (describing these power dynamics).

111. SOLAN & TIERSMA, *supra* note 69, at 234.

bad based on an incomplete record than to get at the full truth.”¹¹²

Solan and Tiersma’s account has less to do with the types of statements being made in the courtroom (“are they lies or not?”) and more to do with the nature of the dynamics at play, coupled with the goals of the justice system. The reason their account succeeds, I think, is that it grounds the literal truth rule in a set of concerns that are specific to the nature of witness examination. Not one of the three rationales they present could be applied more generally to lying.¹¹³

The conclusion holds even if one rejects the idea that there is a genuine moral distinction between lying and merely misleading, adopting the view of Saul and others that the decision to lie rather than mislead reflects more poorly on a person’s character.¹¹⁴ Admittedly, this entire discussion also justifies that it is *difficult* to be a witness on the stand, and one may end up inadvertently offering statements that are misleading but literally true as a product of the back-and-forth of cross-examination.¹¹⁵ This seems to exacerbate the degree to which someone who merely misleads (rather than perjuring herself) can be morally judged for her words. At the same time, however, the choice to offer deliberately misleading but strictly true testimony may in fact reflect *more* poorly on the speaker, since it indicates that she has perhaps fashioned a deliberate structure through which to evade giving a complete picture of events.¹¹⁶ Moreover, as Saul herself notes, in the context of perjury, the speaker has a restricted form of responsibility because the responsibility falls on the attorneys to elicit the full story.¹¹⁷

With these lessons in mind, I now turn to the issue of intent to deceive.

2. Revisiting Intent to Deceive

As we have seen, two types of speech generate problems for the intent-to-deceive criterion that many people would intuitively include in their definitions of lying. One issue involves bald-faced lies, or blatant falsehoods that are *so* clearly false that they cannot intend to deceive. The other involves figurative language, where the literal meaning of a statement is false but the speaker truly does not intend to deceive the

112. *Id.* at 235.

113. Of course, to some degree this presents a quandary, since many of these reasons for why the literal truth rule makes sense *sometimes* in the case of perjury may apply to why the literal truth rule should not be constrained by a *DeZarn*-type rule. See Savage & Martel, *supra* note 70, for a thorough discussion of how limiting the literal truth rule further increases the power disparities between questioners and witnesses.

114. See *supra* notes 31-38 and accompanying text.

115. See Solan & Tiersma, *supra* note 69, at 235.

116. See Tiersma, *supra* note 90, at 393.

117. See SAUL, *supra* note 35, at 122 (“[T]here was plausibly no moral obligation for [Bill] Clinton to avoid misleading [testimony regarding his relationship with Monica Lewinsky]—the obligation to prevent misleading utterances fell squarely and explicitly on the shoulders of the lawyers questioning him, who could and should have insisted on a different definition of ‘sexual relations.’”).

listener. Both of these issues present interesting dilemmas in the context of perjury law.

In the case of bald-faced lies, the tension between perjury and lying is fairly obvious. Having told a truly blatant falsehood *certainly* does not—and should not!—get someone off the hook for a perjury conviction.¹¹⁸ It is much less clear, however that someone who has told a bald-faced lie has actually *lied* in doing so. So what explains perjury’s automatic willingness to group deceptive and non-deceptive perjury together?

In the case of ‘bald-faced perjury,’ one issue may be that by reducing the amount of evidence available, the perjurer renders the justice system less able to carry out its central task (of gathering evidence to support or refute a legal conclusion). In the case of a bald-faced lie, there may be less room for a blatant falsehood to meaningfully affect a person’s beliefs; presumably in order to know that something was a bald-faced lie, the listener must have some awareness of the actual truth. That said, perhaps the harm in bald-faced lying is analogous to the harm I have just identified in perjury, in that a bald-faced lie also at the very least prevents the listener from determining the *actual* truth. Jennifer Lackey discusses a category of ‘knowledge-lies’ that may function this way in ordinary conversation. These “intend to prevent the audience from learning the truth (or learning that something is false) but do not intend to deceive the audience into specifically believing that *p*.”¹¹⁹ If someone wants to locate Spartacus and every slave individually stands up and says “I am Spartacus,” these are obviously bald-faced falsehoods not intended to deceive, but still have the impact of preventing the questioner from determining the real truth.¹²⁰ As such, it is hard to explain on these grounds why bald-faced perjury is always perjury, while bald-faced lying is not necessarily lying.

At the very least, however, it is *more* apparent that bald-faced perjury is perjury than that Sorensen’s knowledge-lies are actually lies. This should make us squeamish about the equivalence between perjury and lying. Perhaps those who argue that bald-faced lies are truly lies are correct—but the fact remains that this is a fraught philosophical question, whereas in the case of perjury no one should seriously say that the most blatant and aggressive perjurers should not be convicted.

Non-literal speech presents a slightly simpler issue, though it also provides an interesting perspective on the difference between perjury and lying. In the domain of lying, it seems that people have alternately chosen to embrace non-literal speech as conveying a different proposition from

118. See, for example, Carson’s scared witness who unconvincingly lies on the stand. Carson, *supra* note 44, at 289.

119. Lackey, *supra* note 4 (citing Roy Sorensen, *Knowledge-Lies*, 70 ANALYSIS 608 (2010)).

120. Sorensen, *supra* note 119, at 608.

what the words literally say,¹²¹ reject non-literal speech as non-assertive,¹²² or impose a stringent intent-to-deceive requirement that would prevent utterances of non-literal speech from being considered as lies.¹²³ Each of these routes has its supporters and detractors when it comes to lying. As regards perjury, however, courts seem to have clearly come down in favor of the Williams approach. They look to context to determine whether there was a clear intended meaning for a figurative expression, and work from there.¹²⁴ Tiersma presents a few examples to support this point. For example, in *United States v. Spalliero*, a federal district court considered the term “juice loan” and concluded that it was proper for a trial court to conclude whether or not that term was truly ambiguous in the context of the line of questioning.¹²⁵ In *United States v. Alberti*, the Second Circuit applied similar reasoning to the interpretation of the figurative term “twenty-four hours a day,” finding that a jury could infer that this meant “fairly regular” rather than literally continuous throughout night and day.¹²⁶ This kind of approach bypasses the intent-to-deceive question entirely by focusing on the *meaning* of the figurative phrase, as determined in context, rather than the surface-level structure of that phrase.

This reasoning also applies to terms with unclear meanings, even when they are not truly figurative. In one such case, the New York Court of Appeals considered a situation (under state perjury law) where someone denied having discharged a “firearm” at animals in a zoo, but had in fact fired a pellet gun at certain animals.¹²⁷ That court found that it will “ordinarily be for the jury, when a perjury defendant claims that his answers to questions asked were truthful because he ascribed a particular meaning to a word, to determine from the context in which the word was used whether the claim is valid.”¹²⁸ Here, the question becomes whether the defendant honestly had a particular word meaning in mind.

Similar reasoning applies to contexts where silence may be reasonably interpreted to unambiguously signify a particular answer. Tiersma provides the example of *People v. Meza*,¹²⁹ in which a prospective juror failed to identify himself when the court asked the jury pool if any of them knew the defendant. There, a California court of appeal rejected the idea that silence could never constitute perjury, finding that in certain cases—

121. WILLIAMS, *supra* note 26, at 98-99.

122. Horn, *supra* note 3, at 6.

123. See Keiser, *supra* note 4, at 463 (describing then critiquing this approach).

124. See Tiersma, *supra* note 90, at 428-29.

125. 602 F. Supp. 417, 420 (C.D. Cal. 1984).

126. 568 F.2d 617, 624 (2d Cir. 1977).

127. *People v. Neumann*, 435 N.Y.S.2d 956, 959 (1980), *cert. denied*, 452 U.S. 918 (1981).

128. *Id.* at 960.

129. 188 Cal. App. 3d 1631 (1987); see Tiersma, *supra* note 90, at 410-11.

as when a direct question has been posed—silence may be equivalent to an answer in the negative. Similarly, in *United States v. Mattox*, the Fifth Circuit found that leaving a form blank in certain circumstances could constitute perjury if the defendant actually did have something to report in that space.¹³⁰ Here, the literal truth of silence is not what matters—what matters is what that silence would be reasonably interpreted to mean, à la Williams.¹³¹

Perjury law thus seems to bypass the intent-to-deceive question entirely, both regarding bald-faced falsehoods and regarding figurative or otherwise perplexing statements. The reason for this is fundamentally evidentiary. In the philosophy of lying, it is fine to stipulate scenarios in which someone does nor does not have the intent to deceive.¹³² In the law of perjury, that is never the case. Indeed, “[l]acking omniscience and sizzling irons, the finder of fact in a perjury case must evaluate what the defendant meant on the basis of objective evidence.”¹³³ This evidence can manifest itself in a defendant’s own assertions of what she meant, in context, or in considering the reasonability of one interpretation versus another.¹³⁴ In other words, when our evidence is limited, we must focus on independently verifiable facts, rather than on a person’s internal motivations or thoughts. But that does not mean that those internal motivations or thoughts are irrelevant to whether a person *lied*; it simply means that the law of perjury is limited in the conclusions it can draw, in a way that the philosophy of lying is not.

The gulf between perjury and lying is perhaps not quite as wide here as it is when considering the assertion-implication distinction. All the same, certain analyses that might work in the case of lying seem not to work in the case of perjury, and vice versa. This provides further evidence for a distinction between perjury and lying. In particular, perjury focuses less on intent to deceive and more on speaker understanding, as construed externally through objective evidence. Perhaps this is also a tenable path to take in the philosophy of lying, but if it is, that would be for reasons that go beyond law. Philosophy can stipulate knowledge of speakers’ internal beliefs or intentions, but legal doctrine may not.

130. 689 F.2d 531 (5th Cir. 1982); see Tiersma, *supra* note 90, at 411.

131. See also Klass, *supra* note 1, at 457 (discussing *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817), a famous case in which the Supreme Court rejected the idea of a duty to disclose, but hinted that they may be more open to a misrepresentation claim if someone remained silent in response to a direct question).

132. See Keiser, *supra* note 4, at 463 (stipulating intent to deceive or lack thereof in her discussion of bald-faced lying).

133. Tiersma, *supra* note 90, at 405.

134. *Id.* On reasonability, Tiersma notes that “[i]f a defendant’s explanation is unreasonable and therefore objectively improbable, it is highly unlikely that she subjectively understood the question or intended her utterance to be taken in the sense she proposes.” *Id.*

3. *Revisiting Speaker and Utterance Credibility*

The final point of tension I identified in the philosophy of lying is the question of what to do with either a particularly untrustworthy speaker or with a speaker who in some way ‘cancels’ the credibility of a particular utterance (for example, by having previously expressed doubts about her memory, or by explicitly portraying the utterance as a tentative statement of belief). It seems fairly clear that a speaker’s holistic credibility makes no difference as to whether she can or cannot perjure herself; the justice system relies on testimony from unsavory witnesses all the time, and those witnesses are just as responsible for their words on the stand as anyone else.¹³⁵ So, this Section is primarily concerned with the ways in which a witness’s credibility may change over the course of a given line of testimony.

I start with expressions of belief—when a witness says something like “I *think* I saw the defendant rob the bank.” Here, the law of perjury essentially moves in lockstep with the standard intuition about lying, which holds that if someone asserts a belief, then we may still consider her to have lied *if* she has lied about her state of mind in holding that belief. Similarly, in the case of perjury, expressions of opinion are also fair game for perjury convictions—but only to the extent that the speaker falsely stated the nature of her opinion in a way that was material to the trial.¹³⁶ So, a witness is not able to “cancel” her credibility entirely; doing so just pushes the scope of a perjury analysis back one step, into the speaker’s own states of belief.

Things become a bit trickier when considering the ways in which a witness’s testimony may fluctuate in credibility over time for reasons that have nothing to do with whether or not the witness expressed belief rather than conviction. It is no secret that cross-examinations are brutal affairs where one primary goal is to impeach the credibility of the relevant witness. A jury or a judge may be left at the end of cross-examination with nagging doubts about whether a witness can be trusted or believed, or whether her memory is as clear as she claims it is. Moreover, while some forms of impeachment go to a witness’s general credibility, others go to the specific nature of the assertion a witness is making at a given moment—such as proof that the witness has a particular bias or that another credible witness has provided markedly different testimony on a specific factual issue.¹³⁷ At the same time, even if a witness is damningly

135. See generally Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413 (2007) (arguing that the use of jailhouse informants and unscrupulous experts, for example, may violate legal ethics and distort the justice system).

136. See Green, *supra* note 1, at 175-76. See generally C.R. McCorkle, *Statement of Belief or Opinion as Perjury*, 66 *A.L.R.2d* 791 (1959) (summarizing law on perjury applied to statements of belief rather than basic statements of fact).

137. See Edward J. Imwinkelried, *Formalism Versus Pragmatism in Evidence: Reconsidering the*

impeached, she is not let off the hook from a perjury conviction.¹³⁸ An impeached witness perjures herself no less when she tells a falsehood than an non-impeached witness might. This circles back to the issue of bald-faced lies and intent to deceive. An impeached witness cannot suddenly assert a falsehood with impunity, but in ordinary conversation, an impeached conversationalist may simply be taken as uttering a bald-faced lie or even as telling a joke if she proceeds. If we have just been discussing how bad my eyesight is and I say, with a straight face, that I can read the words on a small sign two hundred meters away, then one might be more inclined to think that I am engaging in deadpan humor than to think that I have lied. The impeached would-be-perjurer has no such excuse.

More generally, I hope to have at least called into question the presumed identity between perjury and lying. We see that the two come apart in a few important ways. Perjury law treats the literal truth rule differently—but more importantly, adopts a literal truth rule for reasons that are probably completely different from the reasons why philosophers endorse an assertion-implication distinction in the case of lying. While the philosophy of lying prioritizes the literal truth rule to some extent because of preexisting conventions or relationships between the speaker and the listener, that seems to be a less sensible account of why such a rule might matter in the case of perjury. Instead, the literal truth rule applies well to perjury because of the practical dynamics at play between the questioner and speaker; the questioner has more power than the speaker, and the literal truth rule helps to right the scales somewhat. We see a similar trend when it comes to intent to deceive, which seems to matter far less in the realm of perjury than it does in discussions of lying. Once again, however, this does not seem to be due to any inherent moral distinction between the two. Instead, it is because evidentiary concerns limit the degree to which we can probe the inner contents of witnesses' minds. Finally, we see that impeachment has less of an effect on potential perjury than it does on potential lies. While impeachment may convert an ordinary lie into a bald-faced one, it does not affect whether a witness perjures herself.

On a secondary level, this discussion has hopefully illuminated some of the ways in which analyses of perjury and lying tend to blend into one another, and why that may be problematic. If many of the concerns limiting perjury doctrine are functional and based on the limitations of the legal system, it makes far less sense to apply analysis from perjury law to the philosophy of lying—and it makes similarly little sense to apply analysis from the philosophy of lying to perjury law.

Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts That Have not Resulted in a Conviction, 48 CREIGHTON L. REV. 213, 222-24 (2015).

138. This bumps into the issue of the limited recantation option in 18 U.S.C. § 1623, where one of the limits on recantation is when a witness has been so thoroughly impeached that her perjury is essentially obvious.

Interestingly, in some ways this discussion seems limited to *perjury* rather than to the law of deception more generally. The many laws of fraud, for example, penalize misleading statements in ordinary (non-adversarial) contexts. As such, situations of fraud are not as clearly differentiable from ordinary conversation—and discussions of deception more generally may continue to apply.¹³⁹ Even legal defenses to fraud, like the puffery defense, have their analogues in philosophy of deception.¹⁴⁰ These are interesting subjects for another work, though I will not focus on them here except to share my suspicion that these cases are less easily separable from the philosophy of deception primarily because the contexts in which they occur align with the types of contexts considered in philosophical discussion or ordinary conversation. As we will see in the next section, this point has implications for how we conceive of perjury law as well.

III. A NON-LYING ACCOUNT OF PERJURY

If perjury is not lying, then what exactly is it? We can begin by looking to a tension underpinning this entire discussion. In one sense, witness testimony involves something weaker than a conversation. It is a stilted series of questions and answers, rather than a naturally free-flowing exchange of ideas. In another sense, witness testimony involves something stronger than a conversation. The witness has sworn to tell the whole truth, and also speaks with the threat of a perjury conviction looming over her head. Keeping this in mind, I now sketch an alternate account of perjury that separates it from lying, while still explaining why we find it so tempting to draw connections between the two. I begin by discussing the idea of a “courtroom game,” as presented by Jessica Keiser in her article *Bald-Faced Lies: How to Make a Move in a Language Game Without Making a Move in a Conversation*.¹⁴¹ I then apply this account to the conception of perjury that has developed over the course of this Note. As this Part discusses, the ways in which perjury *does* differ from lying are informative, and provide evidence about how to view perjury as a standalone concept.

A. Keiser’s ‘Courtroom Game’

This account draws heavily on Jessica Keiser’s theory of bald-faced lies. Keiser’s main argument is that “bald-faced lies are not genuine instances

139. See generally, e.g., Strudler, *supra* note 27 (comparing situations of hostility to ones of increased trust in conversation, focusing on cases such as securities fraud, and concluding that this affects whether something counts as deception).

140. See generally Harry Frankfurt, *On Bullshit* (unpublished manuscript) (on file with author) (discussing “bullshit” as something distinct from lying, in which someone speaks without paying much attention to the truth or falsity of her statement, merely in an effort to increase her esteem in the eyes of her listener).

141. *Supra* note 4.

of lying because they are not genuine instances of assertion.”¹⁴² Following Austin, she draws a distinction between three components of a speech act.¹⁴³ First is the “locutionary act,” which basically involves uttering the conventional meaning of a sentence. Second is the “illocutionary act,” which involves what that sentence *is*, as in an assertion or a command. And third is the “perlocutionary act,” which is the intent behind uttering the sentence—for example, to get someone to *do* something. Importantly, a speech act may be locutionary without being illocutionary or perlocutionary. In the case of a witness who baldly testifies falsely even though everyone knows that her testimony is false, “[t]here is no reflexive communicative intention above and beyond the transmission of this content.”¹⁴⁴ Or, to put it more simply, the witness does not make a conversational move, but she makes a move in the “courtroom game.”¹⁴⁵ The courtroom game consists of complex interactions between moves, but those moves are not grounded in the communicative content of sentences in the same sense that a conversation might be—or at the very least, they are grounded in different aspects of that communicative content.¹⁴⁶

Importantly, statements made in the courtroom game are connected to genuine conversation in two ways. First, even though statements made in the courtroom game are not genuinely illocutionary, they are *mock illocutionary acts* derivative of genuine conversation.¹⁴⁷ Presumably the particularities of the courtroom structure, particularly witness cross-examination, emerged over time, transforming from a genuine conversation into something more structured and less conversational. And second, “it is possible for there to be both a genuine conversation and a courtroom game going on simultaneously—and for these games to pull together and come apart at various moments in time.”¹⁴⁸ That is, at certain points the witness may genuinely utter illocutionary statements—she may *actually be asserting*, for example, what her name is or when she was born. At other points, however—as in the case of a witness uttering a bald-faced falsehood when she knows no one will believe her—the witness may only be playing the courtroom game, without engaging in the act of conversation overlaid on top of that game.

Keiser primarily intends this to be an account of bald-faced lies as a whole, not just of the courtroom setting. Her main conclusion is that when uttering bald-faced lies, “the speaker is doing something with language

142. *Id.* at 462. Keiser also offers compelling counterarguments against other theories that attempt to subsume bald-faced lies under the general concept of lying. *See id.* at 463.

143. *Id.* at 464 (citing J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 117 (1975)).

144. *Id.* at 471.

145. *Id.*

146. For example, “it is apparent that if a witness testifies that she observed a defendant commit a crime, the courtroom rules dictate that this results in a setback for the defendant.” *Id.*

147. *Id.* at 471-72.

148. *Id.* at 472.

other than making a conversational move.”¹⁴⁹ Here I do not endorse Keiser’s theory as a theory of bald-faced lying, or even necessarily as a theory of perjury.¹⁵⁰ Indeed, for the reasons expressed in Part II, it probably does not make sense to develop a theory of lying—or of why bald-faced lies do not constitute lying—that is grounded in the example of perjury. Despite this, Keiser’s account gets many important things right. Most basically, she demonstrates that it is possible to coherently separate perjury from lying, and to conclude that certain rules or norms apply to one but not to the other. But she also provides support for two other conclusions, both of which I will develop in this section. The first is that just because something seems like conversation does not mean that it necessarily is conversation. And the second is that when we legally determine what does or does not constitute perjury, we essentially set up “rules of the game” for courtroom testimony, rather than codifications of our intuitions about lying. I will discuss each in turn.

Begin with Keiser’s points about why it is so easy to confuse perjury with lying. She argues that there are two reasons: the courtroom dynamic is derivative of ordinary conversation, and moreover, the witness may oftentimes find herself simultaneously engaging in the “courtroom game” *and* genuine conversation. The former does not seem as though it can offer a full explanation of this phenomenon, since there are a number of situations that are *derivative* of real conversation where it is nonetheless very easy to remember that they are not. Plays, for example, often involve highly conversational language that is not just derivative of conversation, but meant to mimic ordinary conversation exactly. Yet the same equivalency does not tend to occur regarding statements made in plays—no one truly wonders whether an actor lies when she utters something in a play that she personally believes to be false. So in some cases, we are clearly competent at instinctively separating locutionary and illocutionary uses of language.

Keiser’s other argument seems more plausible: that oftentimes the courtroom involves both a “courtroom game” *and* aspects of genuine conversation. Lawrence Solan makes this point in the specific context of perjury. He argues that in courtroom cross-examinations, a skilled lawyer can exploit ordinary norms of conversation to lure a witness into false complacency, while really intending to draw out concessions that are particularly congruous with friendly aspects of the law.¹⁵¹ In particular, it is easy for the skilled lawyer to exploit Grice’s cooperative principle

149. *Id.*

150. See, for example, Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PAC. PHIL. Q. 251, 255 (2007), for a discussion of how even in a trial, we may hold a lawyer accountable for lying if she intentionally makes assertions with which she disagrees, even if this lying is not necessarily morally wrong.

151. See Solan, *supra* note 102, at 498.

(“Make your contribution as informative as is required for the current purposes of the exchange”).¹⁵² This means that if a witness begins to relax during her testimony—at least enough to forget that she is in a “linguistic minefield”—she is likely to default to the cooperative principle, and accept [unfair] characterizations of facts.”¹⁵³ Lawyers thus strive for a natural, casual, conversational demeanor—the better to trick witnesses into lowering their guards and engaging in genuine conversational back-and-forth.¹⁵⁴

This, I think, explains the squeamishness one might have with completely separating the concept of perjury from the concept of lying. After all, in many cases a witness committing perjury may think of herself as lying. And indeed, she may actually also *be* lying, if the situation has the attributes of a genuine conversation and she takes herself to be asserting things with communicative intent. Importantly, however, this does not mean that the definition of perjury should be limited by what does and does not count as a lie. The two may track together at points (indeed, they may track together much of the time), but they may also come apart in the ways we have seen.

C. Defining the Rules of the Game for Perjury

By raising the possibility that utterances in a courtroom may at least occasionally be moves in the “courtroom game” *rather than* moves in an actual conversation, Keiser raises a further interesting question: What exactly does the courtroom game look like, and why should it label some things perjury rather than others? Or, to put it differently, when is it appropriate “to structure certain forms of interaction . . . in a way that permits some forms of deception but not others”?¹⁵⁵

Throughout this Note, I have discussed several arguments for or against elements of perjury law that have nothing to do with whether the law accurately tracks our conception of lying. The literal truth rule may make sense in the case of perjury not because of the distinct value of assertion, but rather because of the power disparity between questioners and witnesses such that a witness should not be held to all of the implications of her statements. Perjury law makes no distinction between bald-faced falsehoods and more deceptive falsehoods, but this may be because of the evidentiary limits on determining whether a witness actually intended to

152. Grice, *supra* note 17, at 45.

153. Solan, *supra* note 102, at 498.

154. *Id.* at 512.

155. SCANLON, *supra* note 32, at 320. Scanlon refers to this as “a qualified form of *caveat emptor*.” *Id.* While he argues that in general there is no clear distinction between different forms of deception, he recognizes that we might have practical reasons for distinguishing between the two. Even someone who believes that there is in general a principled distinction between lying and other deception might agree that when it comes to defining *perjury*, our concerns may similarly be motivated by practical reasons.

deceive. Similarly, impeachment of a witness's testimony does not let her off the hook when it comes to perjury, even if impeachment in ordinary conversation may make lying more difficult. I suspect that these elements of perjury law are best explained by thinking of perjury law as setting up part of the rules of the courtroom game. The rules of any game are constrained both by the goals of that game (or the goals of the particular elements of the game that the rules regulate) and by the limitations surrounding that game. We can analyze these rules based on how well they fulfill these considerations—as opposed to how well they hew to some preconceived notions of what the rules of the game should be.

For whatever reason, we have decided that witness cross-examination should unfold as a back-and-forth between the witness and a questioner. Given this constraint, we must then decide how best to balance the competing concerns at stake in that testimony—accessing truth for the purpose of the trial, granting the witness some modicum of respect, and generating a perjury law that is fair to those accused of perjury while still punishing and deterring instances of perjury that do arise. Perjury law coherently could make no distinction between assertions and implications, and fully hold people responsive for evasive or misleading testimony whenever it occurs. It does not—*not* because it must closely hew to a given conception of lying, but rather because of the more functional reasons I have previously discussed.¹⁵⁶

But consider an alternative system where, instead of engaging in a back-and-forth with a questioner, witnesses are called upon to write down everything they know that might be relevant to a potential trial. There are obvious reasons why we may not want such a system (for example, it may generate *too* much information and therefore be inefficient). In the context of that system, though, one might find reason to develop a different sort of perjury law. Indeed, this seems to be partly what has happened regarding the federal law of false statements codified in 18 U.S.C. § 1001. While that law has partially been developed in a piecemeal way due to historical contingencies,¹⁵⁷ it has rejected the literal truth rule in a swathe of circumstances. Indeed, even though Green applies the concept of lying to his analysis of *perjury*, he seems to agree here that in the case of false statements, there is room to adopt a more flexible definition of the crime

156. Conversely, some argue that perjury is too common and the law must be revised so as to better deter perjury. See, e.g., Harris, *supra* note 70. This is also a valid route to take under this approach, though I am ultimately more sympathetic to the idea that perjury law should not inherently disadvantage witnesses for the reasons outlined above.

157. Green provides a fascinating discussion of how the federal crime of false statements developed in the wake of increased regulatory programs during the New Deal, such that the federal government had more of an incentive to prevent fraud against the government. He concludes that the crime of false statements has developed in some ways like perjury and in some ways like fraud, but that there is no real way to explain this other than by referring to the historical facts of the law's development. See Green, *supra* note 1, at 191-92.

due to the lack of opportunity for follow-up questioning.¹⁵⁸ The circumstances of the game, as it were, thus constrain the law of deception we are willing to adopt in those circumstances.

For the most part, it seems that the circumstances of the courtroom testimony game mean that perjury is less sensitive to mere deception, and more sensitive to actual falsehood. But this is not always the case—the courtroom testimony game has also yielded the interesting outcome that certain kinds of mere deception are prohibited as well. Specifically, the courtroom game imposes rules on the questioner that do not arise in the course of ordinary conversation. These help to “right the balance,” so to speak, between witnesses and lawyers. One such rule is the good-faith requirement for questions. As a *literal* matter, a questioning attorney cannot tell a falsehood through questions.¹⁵⁹ As a legal matter, however, questioning attorneys are required to have a good faith basis for the questions they ask.¹⁶⁰ This therefore limits the power of questioning attorneys to deceive, not just to tell literal falsehoods. But the reasoning seems to be similar to the reasoning discussed above—namely, it again protects against a total power imbalance between questioner and witness. Otherwise, as Solan notes, attorneys “could ask witnesses about all kinds of conduct in which they knew the witness had not engaged, insinuating that the judge or jury should nonetheless begin to consider the possibility that the witness had engaged in the conduct and was lying about it.”¹⁶¹ This, of course, is not exactly analogous since questioning lawyers are not accused of *perjury* when they engage in misleading lines of questioning. It does reveal, though, the ways in which different elements of the ‘courtroom game’ trade off with one another—the rules of the game do not just constrain one side, but rather constrain both sides in an effort to make testimony more functional as a general rule.

It is crucial to note, however, that there is also some obvious benefit to keeping perjury law intuitive. The average person may be able to grasp very easily what it means for her to lie on the stand—and if she desires to be a law-abiding citizen, she may use that as a benchmark for how to avoid perjuring herself when she is called upon to testify. In other words, we might want a situation “in which the rules of perjury are more predictable to everyone because they follow more closely the norms of expression one expects and relies upon when communicating with fellow

158. *See id.* at 198 (“When a false statements statute is to be applied to a statement made in [a formal proceeding with follow-up questioning], such statute should reflect the attributes of perjury, including the requirement of literal falsity. When a false statement statute is applied to a statement made in informal proceedings, without the opportunity for ‘cross-examination,’ it should function like fraud”).

159. *E.g.*, Solan, *supra* note 102, at 500 (“Questions do not have truth value, so by definition lawyers cannot lie by asking questions”).

160. *Id.* at 500-01.

161. *Id.*

citizens.”¹⁶² We therefore might resist having the rules of perjury—or of the courtroom in general—stray *too* far from everyday practice. On the other hand, one might wonder whether this issue only arises as the result of a false equivalency between perjury and lying. After all, people are trained to follow legal rules with no ‘real life’ analogue in many other aspects of the law—consider the process of filling out tax forms, or certain rules involving property. If the fact that perjury *is* treated as analogous to lying is what generates the issue, then perhaps the solution is to more clearly disambiguate the two rather than forcing perjury to hew closer to the concept of lying.

In the previous section, I argued against treating perjury and lying as equivalent concepts, especially when it comes from borrowing lessons from one to draw conclusions about the other. This in turn raised the question of how we should conceive of perjury, if not as lying. Here, I have begun to sketch a way to fill that gap. I have provided reason to think that perjury is a manifestation of the rules of a ‘courtroom game,’ and that this game is designed with certain practical goals in mind. *These goals* are the standards by which we should assess the efficacy of perjury law—not whether it sufficiently tracks our already-tangled conception of lying.

CONCLUSION

There are many fruitful avenues through which legal theory can learn from philosophy, and vice versa. This Note is not meant to in any way question that fact, both generally and in the specific context of perjury. At the same time, we must be cautious and self-aware when drawing lessons from one to the other. As a practical matter, this means that analyses of elements of perjury must not rely on an equivocation between the concept of lying and the concept of perjury in order to reach their conclusions.¹⁶³ If they do connect the two, they must account for the ways in which perjury may differ from lying along a number of dimensions, including the degree to which speakers can be expected to give precise answers, the extent to which intent to deceive plays a role, and the significance of speaker credibility.

162. Recent Case, *United States v. DeZarn*, *supra* note 2, at 1788. This point is echoed more generally elsewhere in that piece, where the authors similarly emphasize that we can determine whether the burden of perjury law is unfair by asking “which rule of perjury the average citizen, not knowing her potential later position, would pick.” *Id.* at 1787.

163. So, for example, we should not rely too heavily on parallels between the moral structure of lying and the moral content of the literal truth rule in perjury law. *Cf.* Green, *supra* note 1, at 173-82.