2003

Deception in Morality and Law

Larry Alexander
University of San Diego, larrya@sandiego.edu

Emily Sherwin
Cornell Law School, els36@cornell.edu

LARRY ALEXANDER* and EMILY SHERWIN**

DECEPTION IN MORALITY AND LAW

(Accepted 15 December 2002)

Deception, by which we mean words or conduct intended to induce false beliefs in others, plays a complex role in human life. Well-socialized people revere honesty and disapprove of lying and other forms of deception. At the same time, well-socialized people engage in deception, regularly and skillfully, not only for altruistic reasons but also to gain advantages over others.[1] We know how to suggest false facts through words, conduct, and concealment. Most people,

* Warren Professor of Law, University of San Diego

** Professor of Law, University of San Diego. Thanks to Kevin Clermont, Thomas A.C. Smith, and Christopher Wonnell for help and comments, and to the University of San Diego for generous research support.

[1] See, e.g., Charles V. Ford, *Lies, Lies, Lies: The Psychology of Deceit* (1996), pp. 4–18 (documenting the prevalence of lying in sex, employment, advertising, politics, medicine, and science); Carolyn Saarni and Michael Lewis, "Deceit and Illusion in Human Affairs", in Michael Lewis and Carolyn Saarni (eds.), *Lying and Deception in Everyday Life* (1993), pp. 1, 8 ("deception, lying, falsehood, and masking of our inner selves exist as part of the social world in which we live").

On the development of skills of deception in children, see David Nyberg, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life* (1992), pp. 166–171; Michael Lewis, "The Development of Deception", in *Lying and Deception in Everyday Life*, *supra*, at p. 90. For examples of deceptive behavior by animals, see Ford, *supra*, at pp. 50–52. Deception is clearly adaptive. An accomplished deceiver will have greater success in evading predators and resisting human combatants than a person who lacks this skill. Cf. Sun Tzu, *The Art of War*, Samuel B. Griffith (trans.) (1963), pp. 97–98:

> Ss_-ma I [preparing to attack Chu-ko Liang's city] said: 'Chu-ko Liang is in the city; his troops are few; he is not strong. His generals and officers have lost heart.' At this time Chu-ko Liang's spirits were high as usual. He ordered his troops to lay down their banners and silence their drums, and did not allow his men to go out. He opened the four gates and swept and sprinkled the streets.
>
> Ss_-ma I suspected an ambush, and led his army in haste to the Northern Mountins.

Law and Philosophy **22:** 393–450, 2003.

especially those who are socially successful, also have a highly developed sense of when to mislead and when not to mislead.

Against this contradictory background, we shall compare the treatment of deception in moral theory and in law.[2] We begin with a brief look at moral philosophy as it pertains to deception. We then turn to law, surveying a variety of legal rules regulating deception and noting as well some instances in which the legal system itself is deceptive. Our survey is not exhaustive, but it allows us to draw some general conclusions about the attitude of law toward deception.

Prevailing moral theories strongly condemn at least one form of deception: false assertion, otherwise known as lying. Law initially appears to take an even stronger stance, forbidding both lying and non-lying forms of deception. Behind these general proscriptions, however, are more detailed doctrinal rules that often tolerate deceptive practices, including lies. The pattern of these rules diverges substantially from the logic of prevailing deontological moral theories. Although the legal rules are logically consistent with consequentialist theories, they also stop short of the degree of condemnation that consequentialists typically recommend.

The comparative lenience of law toward deception can be explained in several ways. One possibility is that the costs of regulation are simply too high. A second, related explanation is that the legal system is less effective at regulating deception than is spontaneous private ordering that works through mechanisms of disapproval and reputation. A third explanation is that law tolerates deception because deception can be beneficial. In other words, in some instances the problem may not be the difficulty of regulation, but a lack of desire to regulate. To the extent this last explanation is correct, it is further evidence of a divergence between law and moral theory, at least in its non-consequentialist forms.

Chu-ko remarked to his Chief of Staff: 'Ss_-ma I thought I had prepared an ambush and fled along the mountain ranges.' Ss_-ma I later learned of this and was overcome with regrets.

[2] For an interesting recent analysis of law and morality in criminal law, see Stuart P. Green, "Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements", *Hastings L. J.* 53 (2001), p. 157.

We conclude with a further observation about legal regulation of deception. Assuming that legal rules reflect some ambivalence toward deception, law must also sensitive to both the importance and the fragility of the norm of truthfulness. The need to reinforce this norm, and the odd relationship between truth and deception, help to explain the discrepancy between legal rhetoric and legal enforcement.

I. MORALITY

A. *The Wrong of Lying*

Moral theory typically focuses on lying. A lie, strictly defined, is a statement, verbal or non-verbal, of a proposition that the speaker believes to be false, but that the speaker intends the audience to take as a proposition the speaker believes to be true. Lying in this sense is widely condemned as wrong, but opinions differ as to why. Leading arguments hold either that lying is wrong in itself or that lying results in harm that is grave enough to support a near-absolute prohibition.[3]

A lie may, of course, cause direct harm to the interests of the person lied to.[4] Lies create false beliefs, which the believer may act on to his detriment. When the liar profits from such an act, the result

[3] In his Tanner Lecture on lying, Alisdair MacIntyre distinguishes "two rival moral traditions with respect to truth-telling and lying, one for which a lie is primarily an offense against trust and one for which it is primarily an offense against truth." Alasdair MacIntyre, "Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?", in Grete B. Peterson (ed.), *The Tanner Lectures on Human Values*, vol. 16 (1995), pp. 307, 336. We are indebted to MacIntyre's analysis; however, we are unable to reduce major moral theories of lying to just two distinctive themes.

MacIntyre himself attempts to reconcile insights from both traditions in an argument that "the evil of lying ... consists in its capacity for corrupting and destroying the integrity of rational relationships." *Ibid*., at p. 355. Similarly, Robert Solomon suggests that "[l]ying is wrong because it constitutes a breach of trust, which is not a principle but a very particular and personal relationship between people." Robert C. Solomon, "What a Tangled Web: Deception and Self-Deception in Philosophy", in *Lying and Deception in Everyday Life*, *supra* note 1, at pp. 30, 40.

[4] An example of an analysis of lying based on harm to the interests of the addressee is Hugo Grotius, "On the Law of War and Peace", Francis W. Kelsey

is akin to theft.[5] In itself, however, this explanation of the wrong of lying yields a rather weak prohibition against lying, because it leaves open the possibility of benevolent lies, lies in self-defense, lies to avoid greater evils, and lies to those who by reason of incapacity or wrongdoing are not entitled to truth.[6] Accordingly, moral theorists have sought additional reasons why lying should generally be viewed as wrong.

The strictest deontological theories hold that lying is intrinsically wrong, on one of several grounds. St. Augustine and St. Thomas Aquinas, inspired by Aristotle, maintained that lying is contrary to the laws of nature. God endowed men with the power of speech as a means for expressing their thoughts. As a result, asserting what one does not believe is inescapably sinful, regardless of motive or effect.[7]

Kant also held that lying, defined as false assertion, is absolutely wrong. In Kant's view, false assertion is "directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts"; therefore the liar "throws away and, as it were, annihi-

(trans.) (1925), pp. 613–622 (noting, however, that truthfulness is ideal). See Sissela Bok, *Lying: Moral Choice in Public and Private Life* (1978), at pp. 19–20 (discussing the impact of a lie on the addressee's choices).

[5] See Jeremy Bentham, *The Theory of Legislation*, in C. K. Ogden (ed.) (1931), p. 170 (fraud "borders on theft").

[6] See Grotius, *supra* note 4, at pp. 614–619.

[7] See Augustine, "Against Lying", in R. J. Deferrari (ed.), *Treatises on Various Subjects* (1952), p. 16 ("he has brought forth a universal proposition, saying: 'Thou wilt destroy all that speak a lie' "); Thomas Aquinas, *41 Summa Theologiae 2a2ae, 110, 3*, in T. C. O'Brien (ed.) (1971), pp. 157–159 ("Words by their nature being signs of thought, it is contrary to their nature and out of order for anyone to convey in words something other than what he thinks"). See also Aristotle, *Nichomachean Ethics, Bk. IV, 1127a28–30*, Martin Ostwald (trans.) (1962) ("Falsehood is base in its own right and deserves blame"). Augustine and Aquinas differed on whether a lie necessarily entails intent to deceive. Aquinas held that intent to deceive is not required, a position that indicates strict reliance on the inherent wrongfulness of lying without regard to the position of those who are deceived by the lie. Aquinas, *supra*, at p. 149. Although Augustine and Aquinas viewed all lies as sinful, both drew distinctions among lies, some being more wrongful than others. Augustine, "On Lying", in *Treatises on Various Subjects*, vol. 14, *supra*; Aquinas, *supra*, pp. 153–155.

lates his dignity as a human being."[8] It follows that lying is an offense to all humanity and, most importantly, to the liar himself. To illustrate the absolute character of the moral imperative not to lie, Kant gave the notorious example of lying to a murderer who asks about the whereabouts of his intended victim: in Kant's view, the lie is wrong.[9]

More recently, some have made a linguistic argument against lying that echoes Scholastic and Kantian views. An assertion, by definition, implies truth. Therefore lying, because it violates a universal and constitutive rule of language use, is always wrong.[10]

Another form of argument locates the wrong of lying in harm to the victim's autonomy. A successful lie distorts the reasoning process of the person lied to, displacing his will and manipulating his action for the speaker's ends.[11] The liar thus fails to respect the victim's capacity for reasoned self-governance. On this view, the false belief a lie creates is cause for complaint in itself, even if the victim suffers no further effects. An autonomy-based theory of lying, however, may not rule out all lies: the strength of the prohibition depends on whether respect for autonomy is viewed as an absolute imperative or an ideal that may give way to other values.[12]

---

[8] Immanuel Kant, *The Metaphysics of Morals*, Roger Sullivan (ed.), Mary Gregor (trans.) (1996), p. 182.

[9] Immanuel Kant, "On a Supposed Right to Tell Lies from Benevolent Motives", in Thomas K. Abbott (ed. and trans.), *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics* (1898), pp. 361, 362–363.

[10] See, e.g., Mary Catherine Gormally, "The Ethical Root of Language", in Peter Geach (ed.), *Logic and Ethics* (1991), p. 49. For discussion of this view, see MacIntyre, *supra* note 3, at pp. 311–313.

[11] See, e.g., Christine Korsgaard, "The Right to Lie: Kant on Dealing with Evil", *Phil. and Pub. Affairs* 15 (1986), pp. 325, 330–337, 446–449 (explaining and qualifying Kant's absolute prohibition against lying based on his Formula of Humanity and Kingdom of Ends); David S. Strauss, "Persuasion, Autonomy, and Freedom of Speech", *Colum. L. Rev.* 91 (1991), pp. 334, 354–355. ("Lying creates a kind of mental slavery that is an offense against the victim's humanity".)

[12] Christine Korsgaard interprets Kant in a way that alters the outcome of his extreme example, the lie to a murderer. Korsgaard argues that this lie, unlike most lies, survives the test of universal law: it is logically possible to universalize a principle of lying to known murderers who do not know that their intentions are known, without defeating the purpose of the lie. Korsgaard, *supra* note 11, at pp. 328–330. However, a lie to a murderer does not survive the test of humanity

A quite different type of argument focuses on the harm lies cause to society at large. Specifically, lies degrade the background of trust that supports human interaction. Mill, for example, argued that lies undermine mutual trust, "the insufficiency of which does more than any one thing that can be named to keep back civilization, virtue, everything on which human happiness on the largest scale depends."[13]

Although the problem of social trust is cited by some nonconsequentialists, this line of reasoning seems consequentialist at heart.[14] Perhaps as a result of the argument's focus on consequences, most who adopt this view do not hold all lies to be wrong. Yet, even avowed consequentialists are apt to recommend a strong rule or presumption against lying. Individual reasoners cannot be counted on to take proper account of the cumulative effect on trust of lies that appear minor or benign; therefore they should not lie.[15] Thus, for example, Mill suggested that utility is best served

because no person, including a murderer, can knowingly assent to being deceived. *Ibid*., at pp. 336–337. Korsgaard resolves this conflict by concluding that in a non-ideal world, we must adhere to the principle of universal law, but may depart from the principle of humanity in the face of evil. *Ibid*., at pp. 446–449.

[13] John Stuart Mill, *Utilitarianism* (New York, 1901; 1st edn., 1869), p. 33. See Bentham, *supra* note 5, at p. 260 (falsehood "brings on at last the dissolution of human society").

The difference between this form of harm and harm to the addressee of a lie is nicely expressed by G. J. Warnock: "It is not the implanting of false beliefs that is damaging, but rather the generation of the suspicion that they may be being implanted." G. J. Warnock, *The Object of Morality* (1971), pp. 84–85. Warnock added that the danger is particularly acute because "deception is so easy. . . . [T]here are, so to speak, no 'natural signs . . .' by which the untrustworthy can be distinguished from the veracious, so that, if any may be deceptive, all may be. Nor, obviously would it be of any use to devise some special formula for the purpose of explicitly signaling non-deceptive performance." *Ibid*.

[14] MacIntyre cites both utilitarians and nonconsequentialists as adherents of the view that truthfulness is an imperfect duty based on an offense to "trust." MacIntyre, *supra* note 3, at pp. 310–311 (suggesting, however, that this view raises "consequentialist questions"). Cf. Bok, *supra* note 4, at pp. 18–20, 52–56 (citing the effect of lying on the addressee's choices and on society, but eschewing both consequentialism and other moral "systems").

[15] Bentham also warned that the slightest lie is "a first transgression, which facilitates a second, and familiarizes the odious idea of a falsehood." Bentham, *supra* note 5, at p. 260.

by a general prohibition against lies, subject to a few narrow and well-defined exceptions.[16]

In contrast to these rather stern assessments of the morality of lying, at least one moral philosopher has called truth-telling "morally overrated."[17] David Nyberg points to positive contributions that lies and other forms of deception can make to civility and effective moral teaching; to privacy, self-confidence, and emotional comfort; and even to trust, if trust is understood as the expectation that another will act in one's best interests. Dishonesty, in Nybert's view, is not only a pervasive feature of human interaction, but also a basic adaptive skill and at times a means to good ends.[18] Accordingly, rather than a prohibition against lying, Nyberg favors particularistic evaluation of the ethics of deception, guided by principles of decency.[19] Nyberg is not alone in his ambivalence about the morality of lying,[20] but it is fair to say his tolerant attitude is contrary to prevailing moral theory.

---

[16] Mill, *supra* note 13, at pp. 33–34 ("in order that the exception ... may have the least possible effect in weakening reliance on veracity, it ought to be recognized, and, if possible, its limits defined"). Mill cites, as exceptions, lies that conceal bad news from a sick person and lies that thwart a wrongdoer. *Ibid*.

Sissela Bok, although disavowing consequentialism, takes a more particularistic approach, defending a strong presumption against lying that exempts only those lies that can be "publicly justified." A lie, in Bok's view, is acceptable only if all alternatives have been exhausted and the decision to lie can be publicly justified in the sense that reasonable persons affected by the lie would accept it as legitimate. Bok, *supra* note 4, at pp. 30–31, 103–106. Bok's presumption is quite strong: even trivial and benign lies should generally avoided because they breed more and greater lies. Weighing these costs against potential benefits is not enough because liars will tend to overestimate immediate benefits in comparison to more remote harm to the foundation of social trust. *Ibid*., at pp. 57–61, 71–72.

[17] Nyberg, *supra* note 1, at p. 7.

[18] Nyberg states that although honesty remains an important value, deception "may actually serve to promote and preserve emotional equilibrium on a personal level, and a civilized climate for communicating with each other and living our lives on a social level." *Ibid*., at p. 53.

[19] See *ibid*., at pp. 235–236, 176–191. The problem with deception is not that we engage in it, but that "we have not trained ourselves to deceive thoughtfully and judiciously, charitably, humanely, with discretion." *Ibid*., at p. 25.

[20] See, e.g., Solomon, *supra* note 3, at p. 41 (suggesting that the morality of lying depends on the relationship within which the lie is told).

B. *Lying and Deception*

A lie is an assertion contrary to what the speaker believes.[21] Deception is a much broader concept, encompassing an unlimited variety of devices by which the deceiver creates false impressions in others' minds.[22] It includes actions and omissions, as well as words and strategic silences.

Moral philosophers frequently distinguish between lying and deception and condemn lying as the worse offense.[23] For example, the story of Saint Athanasius appears frequently in discussions of the morality of lying and deception. Saint Athanasius was rowing downstream when he encountered persecutors hot on his trail. Not recognizing him, they asked where they might find the Saint. Athanasius replied "He is not far from here," and the persecutors

[21] As noted previously, some would add that a lie must be intended to deceive. See, e.g., St. Augustine, *Faith, Hope, and Charity*, Louis A. Arand (ed. and trans.), pp. 26–27; *Ancient Christian Writers*, Johannes Quaten and Joseph Plumpe (eds.) (1947); Bok, *supra* note 4, at p. 13, MacIntyre, *supra* note 3, at p. 316 (associating this requirement with those who are concerned with the effects of lying on trust).

[22] See, e.g., Michel de Montaigne, "Of Liars", in Donald M. Frame (trans.), *The Complete Works of Montaigne* (1957), p. 24 ("the reverse of truth has a hundred thousand shapes and a limitless field"); III Henry Sidgwick, *The Methods of Ethics*, 7th edn. (1981), p. 317 (referring to "*suppressio veri* and *suggestio falsi*"); Nyberg, *supra* note 1, at pp. 63–80 (providing examples of deception through the methods of Ashowing and hiding). Experience tells us that it is also possible to deceive oneself, even if this appears to be logically impossible. For interesting discussions of self-deception, see Alan H. Goldman, *Practical Rules: When We Need Them and When We Don't* (2001), pp. 65–71 (discussing theories of self-deception); Nyberg, *supra*, at pp. 81–108 (discussing the indispensability of self-deception).

[23] See, e.g., Immanuel Kant, "Ethical Duties Toward Others: Truthfulness", in Lewis Beck White (ed.), Louis Infield (trans.), *Lectures on Ethics* (1963), p. 226; Roderick M. Chisholm and Thomas D. Feehan, "The Intent to Deceive", *J. Phil.* 74 (1977), pp. 143, 153; Green, *supra* note 2, at pp. 162–168. See also Sidgwick, *supra* note 22, at p. 317 (discussing the view that lying is worse than deception). A notable exception is Aquinas, who wrote that "it does not matter whether someone lie by word or by some sort of deed, and since every lie is sinful, . . . so also is every act of deception." Aquinas, *supra* note 7, at p. 171.

hurried on.[24] The point of the story is not that the Saint deceived, but that he ingeniously avoided the need to lie.

At times, the moral distinction between lying and other forms of deception has been taken to great lengths, as in the Jesuitic doctrine of mental reservation: an otherwise false statement does not count, morally, as a lie if the speaker privately understands the statement in a way that is technically true. (I say, "I didn't do it," thinking "today." In this way I preserve – maybe – a correspondence between my words and my thoughts.)[25] Others have suggested distinctions not only between lying and deception, but among methods of deception. Deceptive acts may be worse than deceptive omissions. Direct deception may be worse than deception by indirection. Deception that creates false beliefs may be worse than deception that negates or blocks true beliefs.[26]

Not surprisingly, the sharpest distinctions between lying and other forms of deception are drawn by deontological theorists, who focus on the nature of false assertions. Kant, for example, saw no wrong in the act of packing bags in the presence of others to create the impression that one is about to leave town.[27] Those who observe this conduct may form false beliefs, but they "have no right to expect that my action will express my real mind."[28] Presumably, in the absence of an assertion, the deceiver is not being false to himself.[29] Nor does the deceiver violate a duty to others, because those who are deceived bear moral responsibility for the inferences they draw.[30]

---

[24] Versions of this story can be found in, among other sources, James Rachels, *The Elements of Moral Philosophy*, 2nd edn. (1993), pp. 165–166 and MacIntyre, *supra* note 3, at p. 336.

[25] Leo Katz, *Ill-Gotten Gains* (1996), p. 29 (quoting Pascal).

[26] See Chisholm and Feehan, *supra* note 23, at p. 145 (identifying eight categories of deception, which differ in degree of wrongfulness). Chisholm and Rogers also suggest moral distinctions that depend on the intended ends of deception. See *ibid*., at pp. 146–148.

[27] Kant, "Ethical Duties Toward Others: Truthfulness", *supra* note 23, at p. 226.

[28] *Ibid*.

[29] Kant offered his bag-packing example in a lecture on duties to others; however, it seems fair to assume that he would extend the same reasoning to his later-developed notion of lying as an offense to the liar's own humanity.

[30] See Green, *supra* note 2, at pp. 166–167. According to Green, a lie implies a personal "warranty of truth" by the liar. Thus, the lie both creates and breaches a "relationship of trust between a speaker and listener." *Ibid*., at p. 166. In a case

Others have expressed this reasoning more formally. An assertion implies a complex set of intentions on the part of the speaker. Specifically, the speaker who asserts a proposition intends the listener to believe (1) that the speaker believes the proposition to be true and (2) that the speaker intends the listener to believe that the speaker believes the proposition to be true.[31] As a result, the assertion has normative force: the listener is justified in believing what the speaker has said.[32] In the absence of an assertion, there is no basis for attributing these intentions to the speaker; therefore, the listener has no right to expect truth, and the wrong is not so grave.[33]

Thus, by this account, if a friend is searching for you in Nordstrom's and calls you on your cell phone, and you tell her falsely that you are not in the store, you have made a lying assertion and can be morally condemned for doing so. If, however, you merely position yourself behind one of the store's pillars to create the false impression that you are not there, you have merely deceived by conduct. If you have committed a wrong a all, it is not as serious as the lie.

Although our present task is descriptive, we note that we are not persuaded by these arguments, which demand too much from the notion of a false assertion. The first difficulty lies in defining an assertion. Members of a community learn to derive meaning not only from each other's statements, or even from assertive conduct, but also from various indirect or wordless ways of conveying information.[34] At the same time, all communication, including verbal assertions, depends on inferences about meaning. Thus, both the person deceived by a suggestion or evasion and the person deceived by a lie participate in the in the deception by properly applying generally understood rules of inference. Neither form of

---

of non-lying deception, the speaker makes no warranty; meanwhile the victim contributes to his own false belief by drawing an inference and failing to query.

[31] Chisholm and Feehan, *supra* note 23, at p. 151.

[32] *Ibid*., at pp. 151–152.

[33] *Ibid*., at p. 153.

[34] In a marketing study, for example, an image of a kitten next to a box of facial tissue proved to be more effective than words in conveying a message that the tissue was soft. See Mitchel and Olson, "Are Product Attribute Beliefs the Only Mediator of Advertising Effects on Brand Attitude?", *J. Marketing Research* 18 (1981), p. 318.

participation seems deserving of sufficient moral weight to shift responsibility from the deceiver to the deceived.[35]

Another difficulty lies in distinguishing false assertions from true but misleading assertions. Without going so far as mental reservation, it is possible to say truthfully that there is no cat in your house when there are three felines but no aging jazz musicians. And it is literally true that Bill Clinton was never alone in the White House with Monica Lewinski if alone means that they were the only people in the building of that name. Although these are not literally lies, they seem equally contrary to nature, humanity, and language. Whether the wrong of lying is seen as offense to nature or humanity or as offense to the autonomy of those deceived, we see no substantial difference between misleading assertions of this kind and assertions that are literally false.

Turning to the effects of deception on trust within a society, arguments based on trust do not depend logically on the existence of an assertion. Presumably any conduct that conveys meaning undermines trust between members of society when used deliberately to instill false beliefs. Yet, those who invoke harm to trust as the principal evil of lying also tend to focus their attention on lies strictly

[35] Jonathan Adler has suggested a distinction between "communicative" and"non-communicative" deception. Communicative deception is akin to lying in that the speaker invites the listener to accept conversational "implicatures" that situate the speaker's remark within the norms of conversation. For example, Adler maintains that in Kant's example of packing bags, the deception is non-communicative and therefore does not invite the other to draw a conclusion. But telling a murderer that his intended victim "has been hanging around the Nevada a lot" invites the murderer to accept an implicature that the victim is now at the Nevada. Jonathan Adler, "Lying, Deceiving, or Falsely Implicating", *J. Phil.* 44 (1997), pp. 434, 444–445.

Adler goes on to argue that, although lying and communicative deception are indistinguishable in terms of intent, consequences, and responsibility, there is nevertheless reason to draw a moral distinction. Specifically, the choice of deception over lying indicates the speaker's effort to avoid either a hurtful truth or a lie, and to deflect rather than deny the moral demand for truth. According to Adler, even if there is no moral distinction between lying and deception in a particular case, there are morally important reasons to maintain a norm that treats deception as the lesser evil. A norm of this kind will serve as a "safety valve" that protects the basic norm of truthfulness in situations in which truth is destructive. At the same time, Adler cautions against abuse of this device. *Ibid*., at pp. 448–452.

defined. Mill, for example, emphasized the effect of lies on "the trustworthiness of human assertion."[36]

Perhaps this position can be explained on the ground that the trustworthiness of assertions has special social importance. If we cannot eliminate all deception from human interaction, we should at least try to preserve core conventions of dialogue. One such convention is that positive assertions of fact are true in the ordinary sense of the words used.[37] If this convention is generally respected, speakers can signal their seriousness by choosing to make assertions, and listeners will have a safe haven of confidence. Yet, again, the argument is weak because it relies on a distinction between direct from indirect assertion. It also results in a prohibition that is all too easy to evade.

II. LAW

A. *Deception Proscribed*

Law prohibits deception in very broad terms.[38] The modern tort of deceit (or fraudulent misrepresentation) cuts through the distinctions drawn by philosophers, encompassing words and conduct,[39]

[36] Mill, *supra* note 13, at p. 33. See Bentham, *supra* note 5, at p. 260 (addressing "falsehood"); Bok, *supra* note 4, at p. 13 (limiting her analysis to lies, defined as intentionally false statements).

[37] See Sidgwick, *supra* note 22, at p. 317 (citing the common view that "it is only an absolute duty to make our actual affirmations true: for it is said that though the ideal condition of human converse involves perfect sincerity and candor, and we ought to rejoice in exhibiting these virtues where we can, still in our actual world concealment is frequently necessary to the well-being of society, and may be legitimately effected by any means short of actual falsehood").

[38] On deception in tort and contract law, see generally 2 Dan B. Dobbs, *Dobbs Law of Remedies*, 2nd edn. (1993), pp. 541–603 [hereinafter Dobbs, Remedies] (remedies for misrepresentation); 1 E. Allan Farnsworth, *Farnsworth on Contracts*, 2nd edn. (1998), pp. 472–477 [hereinafter Farnsworth] (contract doctrine); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton and David G. Owen, *Prosser and Keeton on the Law of Torts*, 5th edn. (1984), pp. 725–735 [hereinafter Prosser and Keeton] (tort doctrine). On deception in criminal law, see generally Wayne R. LaFave, *Criminal Law*, 3rd edn. (2000), pp. 828–850; Green, *supra* note 2, at pp. 182–201.

[39] See Restatement (Second) of Torts §525 and comment b (1977); Prosser and Keeton, *supra* note 38, at pp. 736–740.

active deception and passive non-disclosure,[40] false suggestions and concealment of truth.[41] It covers deception about facts, opinions, or law,[42] and treats evasive half-truths and intentional ambiguities as equivalent to false statements.[43] Similarly comprehensive rules govern deception as a defense to contractual obligation.[44]

Deception is also a crime. This was not always the case: Early English law punished only specific categories of deception, such as forgery and use of false weights and measures, that threatened the public at large or were not avoidable through caution. Simply lying to obtain property was not a crime until the middle of the eighteenth century.[45] In modern law, however, criminal liability is nearly as broad as civil liability. The Model Penal Code, for example, imposes liability on one who, in order to obtain another's property, "creates

[40] See Restatement (Second) of Torts §551 (1977); cf. Prosser and Keeton, *supra* note 38, at pp. 737–738 (citing a general rule against recovery for non-disclosure, subject to numerous exceptions). Liability of non-disclosure remains limited, suggesting that the active/passive distinction may carry some weight in law. See infra.

[41] See Restatement (Second) of Torts §550 (1977); Prosser and Keeton, *supra* note 38, at pp. 736–737 ("Misrepresentation may be found in statements which are literally true, but which create a false impression in the mind of the hearer").

[42] See Restatement (Second) of Torts §525 (1977).

[43] See Restatement (Second) of Torts §§527, 529 (1977); Prosser and Keeton, *supra* note 38, at p. 738 ("half of the truth may obviously amount to a lie, if it is understood to be the whole").

The original common law cause of action for deceit was quite limited, applying principally to deception in the course of judicial proceedings. But falsehood played a significant role in actions of trespass on the case, and breach of promise first entered English law as a form of deception. See J. H. Baker, *An Introduction to English Legal History*, 3rd edn. (1990), pp. 376–384.

[44] See generally Farnsworth, *supra* note 38, at pp. 402–430.

[45] See Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes*, 7th edn. (2001), pp. 951–953; Lafave, *supra* note 38, at pp. 828–829; Green, *supra* note 2, at pp. 182–187. Crimes of deception were gradually enlarged under the headings of embezzlement, false pretenses (defined as acquiring title to property through misrepresentation of existing facts), and larceny by trick. See Green, *supra*. Failure to criminalize fraud may originally have resulted from the requirement that trespass be *vis et armis* (by force and arms). See Baker, *supra* note 43, at pp. 606–608 (discussing the evolution of larceny). By the eighteenth century, however, it also reflected ideas about responsibility. See *Regina* v. *Jones*, 91 Eng. Rep. 330, 330 (1703) (Holt, C. J.) ("we are not to indict one for making a fool of another").

or reinforces a false impression, including false impressions as to law, value, intention, or state of mind; ... [or] prevents another from acquiring information which would affect his judgment of a transaction ...".[46]

B. *Loopholes*

On closer study, legal regulation of deception is not as pervasive as it first seems. There are important exemptions and qualifications in laws governing deception. These loopholes, together with an evident failure to enforce the stated law according to its terms and an interesting willingness to tolerate deception in the operation of the legal system itself, raise questions about the relationship between law and morality. We proceed first to identify some of the ways in which law tolerates deception; later we consider possible explanations and suggest tentative conclusions about deception in law and morality.

1. *Exemptions*

In certain contexts, the typically broad legal prohibition of deception does not apply. For example, liability for fraud is quite limited in the area of sexual relations. In criminal cases, deception does not invalidate consent to sex unless it amounts to "fraud in the factum." Thus, if a woman consents to sex with a man impersonating her husband, he has raped her; but if she consents to sex with a man who falsely swears that he loves her, her consent is effective to protect him from punishment.[47] Tort liability is also limited: the few cases allowing recovery for fraudulent inducement of sex involve particu-

[46] Model Penal Code §223.3. Section 223.3 also covers non-disclosure, but limits liability to non-disclosure to failure "to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary relationship." This is slightly narrower than the standard for rescission of contracts on the ground of non-disclosure. See *infra*.

[47] See Joshua Dressler, *Understanding Criminal Law*, §33.05[c] (1995). This is not because lying is rare in sexual situations. In a survey of college students, 34% of males admitted to lying to obtain sex. 42% of females indicated willingness to lie about the number of their prior sexual partners. See Susan D. Cochran and Vickie M. Mays, "Sex, Lies, and HIV", *N. E. J. Med.* 322 (1990), pp. 774, 774–775.

larly egregious lies, such as lies about venereal disease or infertility that result in serious physical consequences, or lies by fiduciaries.[48]

Another context in which the law shifts to a narrow definition of deception is perjury. As interpreted by the Supreme Court, the crime of perjury requires a false statement of fact. Half-truths, evasive answers, and answers that are literally true but misleading are not punishable.[49]

There may be reasons to isolate these situations for special treatment. The problem of consent to sex raises difficult questions about equity between sexes and about the feasibility and consequences of legal intervention.[50] A strict rule for perjury, confining liability to false assertions, may be justified by the formal opportunities for

[48] See Jane E. "Larsen, Women Understand So Little, They Call My Good Nature Deceit: A Feminist Rethinking of Seduction", *Colum. L. Rev.* 93 (1993), pp. 374, 401–412 (collecting cases); Paula C. Murray and Brenda J. Winslett, "The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relations", *U. Ill. L. Rev.* 1986 (1986), p. 779 (discussing cases involving venereal disease and unwanted pregnancy). Larsen proposes recognition of a tort of sexual fraud, defined as intentional misrepresentation to gain consent to sex. *Ibid*., at pp. 379–380. For a case emphatically denying relief for a husband's claim that his wife falsely represented her sexual desire for him prior to their marriage, see *Askew* v. *Askew*, 22 Cal. App. 4th 942, 958 (1994) (referring to "the sheer unseemliness of litigating tender matters of romantic or sexual emotion in courts of law").

On the question of consent to sex, see generally "Symposium on Consent to Sexual Relations", *Legal Theory* 2 (1996), p. 87.

[49] See *Bronston* v. *United States*, 409 U.S. 352 (1973), in which a witness in a bankruptcy proceeding was asked whether he had ever maintained a Swiss bank account. He replied that his company maintained a Swiss account for six months, thereby eliding the fact that he himself had also maintained Swiss accounts. *Ibid*., at p. 354. The Court held that the witness had not committed perjury.

For an interesting, and entertaining, discussion of perjury and the Clinton impeachment, see Green, *supra* note 2, at pp. 202–211.

[50] Larsen reports that abolition of the tort of seduction, which flourished in various forms from the seventeenth century until the early twentieth century, was due in part to feminist opposition to the ideal of female sexual constraint. See Larsen, *supra* note 48, at p. 390.

For a suggestion that legal treatment of deception in sex is morally problematic but perhaps justified by the difficulties of legal intervention, see Emily Sherwin, "Infelicitous Sex", *Legal Theory* 2 (1996), pp. 209, 227–228.

cross-examination that are available in legal proceedings.[51] Yet the existence of context-based exceptions establishes that, in law, other considerations may sometimes override the norm of truthfulness.

2. *Qualifications*

In addition to legal toleration of deception in particular contexts, the seemingly broad definitions of fraud that govern tort and contract law are subject to subtle but important qualifications. One such qualification, running throughout the legal treatment of deception, is that deception must cause concrete, usually economic, harm. For example, the crime of theft by deception is defined by the Model Penal Code as deception for the purpose of acquiring property, and excludes matters of "no pecuniary significance."[52]

Similarly, the tort of fraudulent misrepresentation normally requires proof of economic loss.[53] Deceit is not among the so-called "dignitary" torts – torts such as assault, battery, false imprisonment, and defamation, for which plaintiffs may recover substantial damages without proof of economic injury.[54] Nominal damages are not available for deceit, and punitive damages are awarded sparingly.[55] Courts have recognized claims for physical injuries, and occasionally for intangible injuries, but the damages awarded have been for identifiable effects of the misrepresentation rather than the

[51] Stuart Green argues that perjury rules correspond to the moral distinction between lying and non-lying deception based on the responsibility of the listener. Green, *supra* note 2, at p. 177. Perjury rules may also reflect a general sentiment of moral leniency toward individuals facing the machinery of the state. Cf. *ibid*., at pp. 198–201 (discussing exculpatory lies).

[52] Model Penal Code §223.3.

[53] Restatement (Second) of Torts §525 (1977) (requiring "pecuniary loss"); Dobbs, *supra* note 38, at p. 548 ("Misrepresentation is an economic tort; actual financial damages are usually required"); Prosser and Keeton, *supra* note 38, at p. 765 ("the plaintiff must have suffered substantial damages before the cause of action can arise"). Although Prosser and Keeton attribute this to the origins of deceit in the action of trespass on the case, the requirement still applies, with occasional exceptions, in modern law.

[54] For a general description of dignitary torts, see Dobbs, *supra* note 38, at p. 304.

[55] See *ibid*., at p. 548 (nominal damages are not recoverable for fraud that causes no harm), p. 568 (favoring punitive damages in cases of harmful and intentional fraud).

affront of having been deceived.[56] Deception also plays a part in other torts, such as defamation, but in these cases the legal wrong lies in the use of deception to pursue ends that are independently tortious, such as harm to reputation.[57] Thus, in regard to the scope of compensable injury, tort law does not go as far to penalize fraud as it does to penalize force.

When the remedy sought is rescission of a transaction rather than damages, courts differ about what sort of harm will suffice. Although many say that pecuniary harm is required, some courts apply the requirement loosely, and others have done away with it.[58] Of course, a claim for rescission based on deception implies that the person deceived was induced to part with value.[59] Thus, even when rescission is allowed without proof of economic loss, it does not follow that courts are providing a remedy for the indignity of deception.

---

[56] Prosser and Keeton, *supra* note 38, at p. 726. For an example of a physical injury case, see *Flaherty* v. *Till*, 137 N.S. 815 (1912), in which the defendant diagnosed the plaintiff with "rheumatism of the stomach," and advised him to cover his body in a poultice of "olive, amber, and kerosine oils."

One aberrant case is *Nickerson* v. *Hodges*, 84 So. 37 (La. 1920). In Nickerson, a woman set about digging for a pot of gold, convinced that her ancestors had buried such an item. The defendants, after watching her dig for several months, buried a pot of dirt and rocks, with a note attached advising the finder to wait three days before opening the pot. The victim found the pot and took it to a bank for safekeeping. The hoax was exposed when the pot was later opened before a group of onlookers. The court awarded $500 for "mental suffering and humiliation, . . . to say nothing of the disappointment and conviction, which she carried to her grave, . . . that she had been robbed." *Ibid*., at p. 39. This case comes close to giving legal redress for conveyance of a false belief. Yet, even here, the key element of harm may have been public humiliation rather than deception itself.

[57] See Restatement (Second) of Torts, ch. 22, Scope Note (1977); Prosser and Keeton, *supra* note 38, at pp. 725–726.

[58] See Dobbs, *supra* note 38, at p. 582 (recommending against a firm rule denying rescission in the absence of damage); Farnsworth, *supra* note 38, at p. 462 (maintaining that damage is "not an inevitable requirement for rescission"); Prosser and Keeton, *supra* note 38, at p. 766 (courts state that damage is required, but often make exceptions).

[59] See Restatement (Second) of Contracts §165 (1981) (misrepresentation must "substantially contribute" to the decision to transact); Farnworth, *supra* note 38, at p. 462 ("in most cases there is no difficulty in finding detriment – the recipient has obtained the thing expected, but has found that it is worth less than the recipient was led to expect").

A case that comes close to giving relief for deception pure and simple is *Earl* v. *Saks & Co*., in which a man purchased a fur coat for $4000 as a gift for a female friend. The actual price was $5000, but the friend had secretly agreed with the store that she would pay the extra $1000. When the buyer discovered that he had been deceived, he sought to return the coat and recover his money. A majority of the court allowed him to do so, saying that on these facts, "the general social interest in stability of transactions is overridden by the interest in not having a seller make intentional misrepresentations which mislead a would-be donor into the erroneous belief that he alone is purchasing and that his donee is to receive from him a fully paid for gift."[60] There are not many cases of this kind, however, and even here it might be said that the indignity had economic consequences, when the infuriated buyer was left with a coat that he had no use for and could not easily sell.[61]

A second qualification, which appears in tort and contract law governing fraud in transactions, is the requirement of justified reliance. Not only must the victim of a misrepresentation rely in fact, but reliance must also be justified according to external standards of reasonableness drawn in large part from custom. The reason most often given for this requirement is a general interest in security of

[60] 226 P.2d 340, 346 (Cal. 1951). Justice Traynor dissented, saying that the fraud was immaterial: at the time of the purchase, the buyer would probably have accepted the deal.

[61] Edmond Cahn's report of the case suggests that the couple split up the night of the purchase. Edmond Cahn, *The Moral Decision*, (1955), p. 130. Whether they fell out over the coat or for other reasons is not clear. Cahn believes the majority was correct in giving legal relief based on the effect of deception on the buyer's "non-economic motives:" "B- - - - - may have had in him something of the medieval troubadour, or at least of the poetic dreamer who serves and worships at Aphrodite's altar. Where another man might fling up to his beloved on her balcony a rose or a song or a poem, B- - - - - would fling her a mink coat." *Ibid*., at p. 131. Alternatively, B- - - - - may have derived pleasure from securing a bargain. Either way, the false belief itself, in Cahn's view, warranted legal relief. See *ibid*., at p. 132.

Another case sometimes cited with *Earl* v. *Saks* is *Brett* v. *Cooney*, 53 A. 729 (Conn. 1902), in which buyers of land disguised their identity and their plan to run a boarding house. The price was fair, but sale for the purpose of a boarding house violated an "honorary obligation" of the seller to his neighbors. In this case, the harm appears to lie in reputational consequences rather than in the deception itself.

transactions, which counterbalances the wrong of misrepresentation and the interest in fully informed consent.[62]

The requirement of justified reliance allows the factfinder to reach a normative judgment about what the victim, given his circumstances, *should* have believed and acted on. It differs from a contributory negligence standard in that the victim's special vulnerability is taken into account. Nevertheless, the effect of the requirement is to place a degree of responsibility on the victim for his own false belief, even in the case of an outright lie.

Without fully defining the requirement of justified reliance, the tort and contract *Restatements* describe several situations in which the victim of a misrepresentation is not entitled to relief. The victim ordinarily cannot rely on an adverse party's statement of opinion as an assertion that content of the opinion is correct.[63] This limitation gains importance because statements about the value, quality, or authenticity of an item for sale are deemed to be statements of opinion, even if they take the form of factual assertions.[64] Thus, if a seller asserts that the goods he is offering are "worth $10,000,"

[62] See Farnsworth, *supra* note 38, at p. 400 (citing general concern for stability of transactions); Prosser and Keeton, *supra* note 38, at p. 753 (discussing materiality). Prosser and Keeton also imply that the requirement of justifiable reliance is best understood as testing the credibility of the claim that fraud induced the plaintiff to act. Prosser and Keeton, *supra*, at p. 753. This view, however, makes justifiable reliance redundant of causation.

[63] See Restatement (Second) of Torts §542 (1977). This is echoed in the Restatement (Second) of Contracts, §169 (1981). In each case, opposite conclusion applies under certain conditions, such as a confidential relationship, a claim of expertise, or special vulnerability on the part of the victim. Restatement (Second) of Torts, *supra*, §542(a)–(d); Restatement (Second) of Contracts, *supra*, §169(a)–(c). Further, the victim may, depending on the circumstances, be entitled to infer from a statement of opinion that the speaker had some support for the opinion and was not aware of contrary facts. Restatement (Second) of Torts, *supra*, §539; Restatement (Second) of Contracts, *supra*, §168(2).

Statements of law may be treated either as statements of fact (justifying reliance) or as statements of opinion (ordinarily not justifying reliance), depending on the circumstances. See Restatement (Second) of Torts §545 (1977); Restatement (Second) of Contracts §170 (1981).

[64] Restatement (Second) of Torts §538A(b) (1977); Restatement (Second) of Contracts §168, comment c (1981).

having purchased them for $8000, the statement will be treated as an opinion, on which the victim cannot justifiably rely.[65]

Statements of intention are also to be viewed with suspicion. The *Restatement (Second) of Torts* states that reliance on a statement of intention is justified only if "the recipient has reason to believe that it will be carried out."[66] The *Restatement (Second) of Contracts* goes further, providing that "the recipient is not justified in relying . . . if in the circumstances a misrepresentation of intention is consistent with reasonable standards of dealing."[67] This rule is illustrated by the example of a buyer of land who lies about his intended use of the land in order to conceal his special need for the seller's property. According to the *Restatement*, the seller is not entitled to rely, and may not later claim rescission.[68]

Another aspect of the requirement of justified reliance is that a victim of misrepresentation may not ignore evident facts to the contrary. The victim is not held to a standard of reasonable care in investigating the truth or falsity of statements made in negoti-

[65] Restatement (Second) of Contracts §168, illus. 2 (1981); see Farnsworth, *supra* note 38, at p. 464 (remarking that a seller's statements about quality or value are more likely to be understood as statements of opinion than statements about quantity or market price); Prosser and Keeton, *supra* note 38, at p. 757 ("sales talk, or puffing, . . . is onsidered to be offerend and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer"). At best, the victim would be justified in drawing an inference about background facts known to the seller, but only if the inference were "reasonable." Several references in the Restatements to sellers' well-known habits of "puffing" and exaggerating value suggest that in this case, an inference of supporting facts would be unreasonable. See Restatement (Second) of Contracts §168, *supra*, comment d (referring to the "propensity of sellers and buyers to exaggerate the advantages to the other party of they bargains they promise"); Restatement (Second) of Torts §539, comment c (1977) (referring to the "habit of vendors to exaggerate").

[66] Restatement (Second) of Torts §544 (1977) (adding in comment a that reliance is justified "only when the representation gives its recipient reason to believe that the intention is firmly entertained").

[67] Restatement (Second) of Contracts §171(1) (1981); see Farnsworth, *supra* note 38, at p. 471 ("courts have accorded the maker considerable latitude in misrepresenting intention if the statement if of the kind that is generally regarded as unreliable").

[68] Restatement (Second) of Contracts §171, comment a, Illus. 2 (1981).

ations.[69] He is, however, responsible for laxity that amounts to "a failure to act in good faith and in accordance with reasonable standards of fair dealing."[70]

The *Restatement (Second) of Torts* adds, as a further element of justified reliance, a requirement of materiality.[71] A misrepresentation is material if "a reasonable man would attach importance" to it, or alternatively, if the speaker knew or had reason to know it had special significance for the victim.[72] If the misrepresentation is not material, the victim has no tort claim. This rule introduces a *de minimus* limit: some misrepresentations, even if believable and in fact believed and acted on, are too minor to have legal consequences.

---

[69] Restatement (Second) of Torts §540 (1977); Restatement (Second) of Contracts §172, comment b (1981); see Farnsworth, *supra* note 38, at p. 465 (noting that failure to investigate is often excused); Prosser and Keeton, *supra* note 38, at p. 752 (indicating that claimants may rely without investigation).

[70] Restatement (Second) of Contracts §172 (1981). Restatement (Second) of Torts §541 provides, to similar effect, that the victim is not justified in relying in the face of "obvious" falsity. Both Restatements explain that the victim must "use his senses" and not rely "blindly." Restatement (Second) of Torts §541, comment a (1977); Restatement (Second) of Contracts, *supra*, §172, comment b.

[71] The materiality requirement is omitted from the rules for rescission of contracts stated in the Restatement (Second) of Contracts, although it may be recognized by courts. Restatement (Second) of Contracts (1981), §164 (authorizing rescission for "either a fraudulent or a material misrepresentation") and comment b (noting the difference between tort and contract rules). See 1 Farnsworth, *supra* note 38, at p. 459 (observing that cases granting rescission for non-material fraud are "difficult to find.")

Despite the explicit omission of the materiality requirement, comments to the *Restatement* state that reliance on a misrepresentation of facts that are "of only peripheral importance to the transaction" is not justified. Restatement (Second) of Contracts §164, *supra*, comment d. Further, reliance in fact is presumed if the misrepresentation is material, but must be established if it is not. Restatement (Second) of Contracts, *supra*, §167 comment b.

For a discussion of the role of materiality in tort and contract rules, see Emily Sherwin, "Nonmaterial Misrepresentations: Damages, Rescission, and the Possibility of Efficient Fraud", *Loyola L. Rev.* 36 (2003), p. 1017.

[72] Restatement (Second) of Torts §538(2) (1977). Prosser and Keeton explain the relationship between justifiable reliance and materiality by saying that, while other elements of justifiable reliance are concerned with representations that should not be *believed* (such as a seller's "puffing" or an adverse party's statement of opinion), materiality is concerned with representations that should not be *acted on*. Prosser and Keeton, *supra* note 38, at p. 753.

It is worth noting that the various legal guidelines for determining whether reliance is justified rely heavily on custom. The implications of a statement of opinion must be judged "in light of the realities of the marketplace," taking into account "the propensity of sellers and buyers to exaggerate the advantages . . . of the bargains they promise."[73] A statement of intention should not be taken as true if "reasonable standards of dealing" permit deception.[74] Similarly, parties are expected to "act in good faith and in accordance with reasonable standards of fair dealing" in assessing the statements of others.[75] Thus, in significant ways, the rules follow rather than shape the evolution of trade practices.

Another limitation on the seemingly broad legal prohibition of deception is a substantial immunity for deception in the form of non-disclosure. Passive deception is not always permissible. Special facts may generate a duty to disclose, as when one party to a transaction learns something that makes a prior statement misleading.[76] Custom also may impose a duty to disclose. For example, the *Restatement (Second) of Torts* requires disclosure when one party to a transaction knows the other is making a mistake about "basic" facts, and the mistaken party, "because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure."[77] Disclosure

[73] Restatement (Second) of Contracts §168, comment d. To the same effect, see Restatement (Second) of Torts §539, comment c; see Farnsworth, *supra* note 38, at p. 471 (referring to general understandings); Prosser and Keeton, *supra* note 38, at p. 757 (same).

[74] Restatement (Second) of Contracts §171(2) (1981).

[75] *Ibid*., §172.

[76] Restatement (Second) of Torts §551(2)(c) (1977); Restatement (Second) of Contracts §161(a) (1981); see Farnsworth, *supra* note 38, at p. 453 (discussing subsequently discovery of falsehood); Prosser and Keeton, *supra* note 38, at p. 738 (same). Disclosure is also required to clarify a statement that would otherwise be misleading, to correct a prior misrepresentation before it is acted on, or within a fiduciary relationship. Restatement (Second) of Torts, *supra*, §551(2); Restatement (Second) of Contracts, *supra*, §161.

[77] Restatement (Second) of Torts §551(2)(e) (1977). The Restatement of Contracts provides similarly that disclosure is required when one party knows the other is mistaken "as to a basic assumption on which the party is making the contract," and nondisclosure "amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts §161(d) (1981).

requirements of this kind have become stricter over time, especially in settings in which parties tend to differ in their sophistication.[78] Yet, in a transaction between similarly situated parties, a party with pertinent information generally may withhold the information and take advantage of the other party's ignorance. As stated in comments to the *Restatement (Second) of Torts*, "[t]o a considerable extent, sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages, which lead to no liability."[79]

3. *In Contrast: Fiduciary Duties*

The significance of the various limitations on liability for misrepresentation under basic rules of tort and contract law is indicated by the stricter rules applied to fiduciaries.[80] Fiduciary rules apply to those acting in certain recognized fiduciary rules, such as lawyers, doctors, brokers, and trustees, and to those occupying roles that appear, on case-by-case analysis, to invite confidence. Statements that otherwise would be treated as unreliable statements of opinion become assertions that justify reliance when spoken by fiduciaries.[81]

---

[78] See Prosser and Keeton, *supra* note 38, at p. 739 (noting "a rather amorphous tendency . . . to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed"); G. Richard Shell, "Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend", *Nw. U. L. Rev.* 82 (1988), pp. 1198, 1232–1234 (discussing and endorsing enlarged disclosure requirements under state consumer protection and deceptive trade practice statutes).

[79] Restatement (Second) of Torts §551, comment k (1977).

[80] On fiduciary relationships, see, e.g., Gregory S. Alexander, "A Cognitive Theory of Fiduciary Relationships", *Cornell L. Rev.* 85 (2000), p. 767 (suggesting that courts rely on cognitive schemas in judging the behavior of fiduciaries); Robert Cooter and Bradley J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences", *N. Y. U. L. Rev.* 66 (1991), p. 1045 (outlining an agency approach); Frank H. Easterbrook and Daniel R. Fishel, "Contract and Fiduciary Duty", *J. L. & Econ.* 36 (1993), p. 425 (arguing that fiduciary relationships are derivable from contract); Tamar Frankel, "Fiduciary Law", *Cal. L. Rev.* 71 (1983), p. 795 (providing an overview); Deborah A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligations", *Duke L. Rev.* 1988 (1988), p. 879 (emphasizing the fact-specific nature of fiduciary duties).

[81] Restatement (Second) of Torts §542 (1977); Restatement (Second) of Contracts §169 (1981); see Farnsworth, *supra* note 38, at p. 468 (discussing

A fiduciary's failure to disclose information is equivalent to misrepresentation, although a non-fiduciary would be permitted to exploit similar informational advantages. Fiduciary disclosure requirements extend not only to material information, but to "all relevant facts."[82]

These special rules close most legal loopholes pertaining to deception when the parties' relationship is deemed to require a greater than ordinary degree of trust. By raising standards in a limited class of cases, they imply that in the ordinary run of legal relations, trust is not absolutely prized. Fiduciary rules also suggest that when trust is given high priority, the mechanisms for stricter legal regulation of deception are in place. In recent years there has been a proliferation of regulations imposing fiduciary obligations in various sensitive settings, such as sales of securities to the public. Yet, although the field of fiduciary relations has expanded, the gap between fiduciary and non-fiduciary requirements persists and continues to highlight the limitations of ordinary rules governing deception.

4. *Law and Practice*

Another, rather obvious point about legal rules governing deception is that they are under-enforced. Consider, for example, a job interview. As a candidate, the first thing you do is select from your closet your best suit, a much nicer set of clothes than you typically wear to work. Throughout the day, you are bright and cheerful to everyone you meet, despite a headache and contrary to several personality traits you know it is best to suppress. You sit and speak in ways you think will suggest confidence and ease, neither of which you feel. You express your interest in Lincoln, Nebraska, and your curiosity about municipal bond financing. Each of these acts is designed to mislead, in a transaction that has real stakes for everyone, and is not an act of benevolence on your part.

On a plausible reading of the Model Penal Code, the candidate has committed a series of crimes. An employee's businesslike

special duties of fiduciaries in regard to statements of opinion); Prosser and Keeton, *supra* note 38, at p. 738 (same).

[82] Restatement (Second) of Contracts §173 (1981); Farnsworth, *supra* note 38, at p. 550 (discussing disclosure duties of fiduciaries); Prosser and Keeton, *supra* note 38, at p. 452 (same).

appearance, collegiality, commitment to the employer's locale, and level of interest in the work are matters of "pecuniary significance" to the employer, and on each of these points the candidate has deliberately conveyed a false impression.[83] The elements of tort liability, if interpreted literally, are also in place.

Yet, the job candidate would surely be surprised if accused of a crime or a tort. On the criminal side, prosecutorial discretion and other procedures for selective enforcement would screen out a case of this kind. On the civil side, a common sense interpretation of doctrinal requirements such as materiality and justified reliance, informed by customs that are well understood even if difficult to articulate, would have a similar effect.

In practice, therefore, express omissions and qualifications of liability are supplemented by unwritten limits on liability for deception. At the same time, there is no great uncertainty about the actual reach of the law. We seem to have a working understanding of what is truly prohibited and what is not.

C. *Deception Within the Legal System*

In addition to tolerating a good deal of deception by private actors, our legal system itself engages in various types of deception. Much of what lawyers do in representing clients can be viewed as deceptive. Judges traditionally have endorsed legal fictions as means of adjusting rules of law to new circumstances. The body of law at times seems designed to mislead ordinary citizens about the content of legal duties and the consequences that follow from their breach. Finally, there is a sense in which any determinate legal rule of conduct deceives its audience about what action they should take.

1. *Lawyers*

The place of honesty within the professional obligations of lawyers has been debated without resolution for many centuries.[84] Truth and candor are naturally in conflict with strong advocacy, persuasion of

[83] See Model Penal Cole §223.3; text at note 46, *supra*.

[84] For an interesting review of positions taken by jurists and philosophers, focusing on the case of *Regina* v. *Courvoisier*, 173 Eng. Rep. 869 (1840), see David Mellinkoff, *The Conscience of a Lawyer* (1973), pp. 220–269.

legal decision-makers, effective negotiation, and protection of client confidences.[85] To argue effectively for a client's legal positions, a lawyer must present law and facts favorably. Outright fabrication or falsification is prohibited by ethical rules, and most lawyers respect those rules.[86] But favorable presentation often means offering one interpretation when the lawyer, on objective reflection, actually finds another more convincing.[87] Especially when arguing to a jury, the lawyer must present his interpretation with confidence and enthusiasm, and must offer it as part of a coherent and appealing "story" of the case.[88] Even when arguing law to a court, the lawyer, although he may not misrepresent the facts or holdings of cases or the wording of statutes, will frequently make claims about policy and morality that he does not accept because, at bottom, he believes that the premises underlying them are false or the reasoning from them is fallacious. The lawyer does these things in the role of advocate, but maximally effective advocacy also requires the lawyer to disguise to some extent his adversary posture.[89]

In addition to advocacy, a lawyer serves as professional negotiator in settlements and other transactions. Here the temptation

[85] See Charles W. Wolfram, *Modern Legal Ethics* (1986), p. 639 (objectives of "truth, zeal, and confidentiality . . . can pull in different directions").

[86] Richard Underwood, a former Chairman of the Kentucky Bar Association's Ethics Committee, suggests that lawyers are mixed at best in their compliance with various requirements of truthfulness. Underwood also suggests that, although people want lawyers to be honest in the abstract, "they do not shop for ethical lawyers." Richard H. Underwood, "The Professional and the Liar", *Ky. L. J.* 87 (1998–1999), pp. 919, 937–937, n. 57.

[87] See *ibid*., at p. 643 ("It is certainly not a standard requirement that an American advocate must always avoid distorting facts.").

[88] See, e.g., Michael E Tigar, *Persuasion: The Litigator's Art*, pp. 6–8 (emphasizing the important of telling a story: "The jurors will find one. The advocate had better tell one."). Tigar recommends that lawyers "map out a closing argument in the very first stages of working on a case," in order to fit subsequent investigations and reflections into a coherent story. *Ibid*., at p. 15. "In working the case, you say its story over and over." *Ibid*., at p. 16.

[89] Tigar advises that "Your credibility is a necessary, though not sufficient, condition for victory. You first exercise this principle in opening statement, telling the jurors there are hard choices to make in this case." *Ibid*., at p. 151.

For a unsparing account of this and other forms of dissembling by lawyers, see Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (1999), pp. 104–108.

is to withhold or mischaracterize information about the client's preferences, such as willingness to litigate or to accept particular settlement terms.[90] A lawyer who has mastered these tactics can cut costs and gain advantages for the client and, in some circumstances, for himself as well.[91]

In the debate over lawyers' obligations of truthfulness, one view is that lawyers should be held, morally and legally, to the same standards as non-lawyers.[92] Others, however, have argued on various grounds that special role-based moral standards permit lawyers to engage in what otherwise would be unacceptably deceptive practices. For example, some say that artful advocacy by lawyers is permissible when it is done for a good cause.[93] Some have suggested that a lawyer's participation in an adversary legal system justifies the lawyer in arguing what he does not believe because unfettered argument on all sides will ultimately lead to fair and just outcomes.[94] Some have even maintained that deception by lawyers

[90] See Applbaum, *supra* note 89, at pp. 104–105 (discussing negotiating tactics).

[91] On contingency fees, *see generally* Kevin M. Clermont & John D. Currivan, Improving on the Contingency Fee, 63 Cornell L. Rev. 529 (1978).

[92] For extensive analyses of role morality, see Applbaum, *supra* note 89; David Luban, *Lawyers and Justice: An Ethical Study* (1988). Applbaum comes close to the position described in the text. He rejects the "argument from redescription," which proposes, for example, that misrepresentation by a lawyer is *advocacy*, and therefore cannot count as a *lie*. See Applbaum, *supra*, at pp. 76–109. He accepts that roles may create moral permissions, but only in exceedingly narrow circumstances that are unlikely to obtain in settings such as law, politics, and business. *Ibid*., at pp. 113–135. Otherwise, acts performed within a role must be judged all-things-considered according to their persistent pre-practice descriptions. *Ibid*., at pp. 89–98. See also Wolfram, *supra* note 85, at pp. 725–726 (favoring disclosure standards for lawyers equivalent to those that apply to non-lawyers).

[93] See Tigar, *supra* note 88, at p. xiv ("The well-lived life of the advocate must include concern for how we use those tools. Their highest and best use is against government attempts to stifle democratic rights and to use state power in illegitimate ways"). See also Mellinkoff, *supra* note 84, at pp. 248–249 (associating this view with Sir Matthew Hale and Jeremy Taylor).

[94] See, e.g., Basil Montagu, *Essays and Selections* (1837), pp. 266–267 (an advocate acts under the assumption that "truth is elicited and difficulties disentangled by the opposite statements of able men"). Jerome Frank quotes Baron Macaulay, without citation, as stating "that we obtain the fairest decision 'when two men argue, as unfairly as possible, on opposite sides,' for then 'it is

does not count as true deception, because no one expects a lawyer to be truthful.[95] (If, however, no one expects a lawyer to be truthful in these contexts, then just how are we to explain what the lawyer is doing in making false assertions?)

The A.B.A. Model Rules of Professional Conduct prohibit lawyers from engaging in "dishonesty, fraud, deceit, or misrepresentation."[96] However, specific provisions are less inclusive and suggest at least a limited privilege for deception in the interest of effective advocacy. In arguing a case before a court, a lawyer must not "make a false statement of material fact or law," fail to disclose

certain that no important consideration will altogether escape notice'." Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1949), p. 80. Frank refers to this view derisively as "the 'fight' theory, a theory which derives from the origins of trials in substitutes for out-of-court brawls." *Ibid*. Samuel Johnson is reported to have said that it is not the role of the advocate to judge truth: "an argument, which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why then, Sir, you are wrong, and he is right." 1 James Boswell, *Boswell's Life of Johnson*, in Chauncey B. Tinker (ed.) (1933), pp. 366–367. See also Joint Conference on Professional Responsibility, Report, 44 *A.B.A. J.*, pp. 1159, 1160–1161 (defending partisan advocacy as "the only effective means for combating [the] natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known"); Charles Fried, "The Lawyer as Friend", *Yale L. J.* 85 (1975), pp. 1060, 1066 (suggesting that lawyers are morally justified in favoring the interests of clients in ways that may be harmful to others or to society because the lawyer occupies a role analogous to that of a friend). Cf. Applbaum, *supra* note 89, at pp. 199–200 (suggesting that the claim that connection between zealous legal advocacy and ultimate legal truth unproven); Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", *A.B.A. Rep.* 29 (1906), pp. 395, 404–406 (criticizing the "sporting theory of justice," which American lawyers take as "a fundamental legal tenet"); Luban, *supra* note 92, at pp. 50–149 (reviewing and criticizing arguments for role morality based on participation in an adversary legal system and concluding that, outside the criminal law, reasons supporting the adversary system are too weak to support a broad moral justification for partisan deviation from otherwise applicable moral standards).

[95] See Boswell, *supra* note 94, at p. 367 (quoting Johnson as stating that "Everyone knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation"); Mellinkoff, *supra* note 84, at pp. 249–257 (discussing the view that a lawyer's representations are too inherently unbelievable to count as deception).

[96] A.B.A Model Rules of Professional Conduct, Rule 8.4(c) (1983) [hereinafter MRPC].

authority that is directly adverse and controlling, or offer evidence the lawyer knows to be false.[97] Yet, comments state that the lawyer "usually is not required to have personal knowledge" of matters asserted in litigation documents; in other words, the lawyer may assert what the client has told him if he does not know it to be false.[98] The comments also emphasize that "the lawyer's discussion of law need not be disinterested."[99] As to evidence, the lawyer "may" refuse to present evidence he "reasonably believes" to be false, implying that he may also choose to present the evidence if he believes but does not know that it is false.[100]

Another set of rules governs lawyers' truthfulness in dealing with private parties who are not clients. A lawyer may not make a "false statement of material fact or law" to another party.[101] The lawyer must also disclose material facts if disclosure is necessary

[97] MRCP Rule 3.3(a).

[98] *Ibid*., comment [2].

[99] *Ibid*., comment [3].

[100] *Ibid*., comment [14]. See Wolfram, *supra* note 85, at pp. 655–656 (lawyers have discretion, but no duty, to refuse to present evidence they believe to be false).

The Model Rules also provide that in arguing before a jury, a lawyer must not "state a personal opinion as to the justice of a cause." MRPC Rule 3.4(e); see Mellinkoff, *supra* note 84, at p. 60 (referring to Canon 15 of the 1908 A.B.A Canons of Professional Ethics as the most violated of all the rules of ethics). Lawyers, however, sometimes circumvent this requirement by suggesting their belief in the client's cause in the guise of analyzing evidence. For example, in a book on legal argumentation, the criminal defense lawyer Michael Tigar analyzes a successful closing argument by Edward Bennett Williams on behalf of John Connally, who was accused of taking bribes from a lobbyist for milk price supports during his tenure as Secretary of the Treasury. Williams posed the question whether testimony by a government witness of dubious veracity established Connally's guilt beyond a reasonable doubt. Addressing the jury, he then stated, "I don't think you can say that." Tigar interjects his commentary:

> Did he step over the line by saying 'I don't think?' An advocate cannot express a personal belief in the client's cause. He or she may, however, say what the evidence shows. What Williams said does not, in my view, cross that line . . .
>
> As a matter of tactics, however, one should be careful to inject a personal view. You want the jurors to see their way to a conclusion, the better to hold on to it.

Tigar, *supra* note 88, at pp. 180–181.

[101] MRPC Rule 4.1(a).

to "avoid assisting a criminal or fraudulent act by a client."[102] However, comments to the rules state that "under generally accepted conventions of negotiation," estimates of price or value, or intentions about acceptable settlement, are not considered statements of fact.[103] Thus, the lawyer's obligation to avoid false statements is subject to at least the same qualifications found in tort and contract law, and may be further limited to "statements" of fact, as distinct from half-truths or other forms of deception. Moreover, the lawyer's duty of disclosure is expressly made subject to the potentially conflicting duty to protect client confidences.[104] The lawyer may suppress information relating to his representation of a client, even when disclosure would otherwise be required under tort and contract rules – for example, to correct an evident mistake of the other party about facts that are basic to the transaction.[105] In this way, the A.B.A rules create an immunity from otherwise applicable law for lawyers acting within their professional roles.

2. *Legal Fictions*

English and American courts have a long tradition of using or tolerating legal fictions as means for adapting law to new circumstances.[106] The earliest fictions were ingenious devices for circumventing the rigid rules of medieval procedure. For example, in

[102] *Ibid*., Rule 4.1(b).

[103] *Ibid*., comment [2].

[104] *Ibid*. See Wolfram, *supra* note 85, at pp. 723–726 (finding the client confidence exception unwarranted). For a reading of the history surrounding Rule 4.1(b) that minimizes the confidentiality requirement, see Nathan M. Crystal, "The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations", *Ky. L. J.* 87 (1998–1999), pp. 1055, 1983–1988 (suggesting that matters other than client wrongdoing must be disclosed). The latest version of the *Restatement of the Law Governing Lawyers* does not exempt confidential information from disclosure requirements, and suggest that ordinary tort and contract rules governing misrepresentation and nondisclosure apply to lawyers. See Restatement (Third) of the Law Governing Lawyers, §§61–67, 93 (1999).

[105] See Restatement (Second) of Torts §551(2)(e); Restatement (Second) of Contracts §161(d).

[106] See, e.g., Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, Sir Frederick Pollack (ed.) (1907), pp. 26–32 (discussing three methods of legal change: legal fiction, equity, and legislation; and tracing the origins of legal fiction in Roman law); Baker, *supra* note 43, at pp. 230–232; Lon L. Fuller, *Legal Fictions*, p. 53 (refer-

the writ system as it crystallized in the fourteenth century, only primitive writs involving cumbersome procedures were available to landowners who were ousted from possession.[107] Lessees, on the other hand, could challenge third parties who interfered with their possession using the much simpler writ of ejectment, a form of trespass action that was tried before a jury. To obtain the advantages of ejectment, landowners' lawyers devised a plan in which the landowner leased his land nominally to a friend and put the friend in possession. The friendly lessee then brought an action of ejectment against the wrongful possessor, with the approval of the court. By the seventeenth century, the fiction had evolved to a point at which the aggrieved landowner brought an action of ejectment in the name of an imaginary lessee, John Doe, against Richard Roe, the imaginary lessee of the real defendant (the wrongful possessor). When Roe, who was invented and controlled by the landowner's lawyer, "appeared" in the action, the court permitted the real defendant to intervene on Roe's behalf, but only if the defendant consented to abide by the Doe-Roe fiction. This procedure led to the demise of the old writs for recovery of land, which were eventually superseded by the fictitious ejectment.[108]

ring to "historical fiction"). For a negative view, see 5 Jeremy Bentham, *Works*, John Bowring (ed.) (1843), p. 92 (calling legal fiction "a syphilis").

[107] The writ of right, the writ of entry, and the assize of novel disseisin are discussed in Baker, *supra* note 43, at pp. 262–271. The writ of right originally was tried by "battle" – a stylized combat between the parties or their representatives. See *ibid*., at pp. 68–69.

[108] The ejectment fiction is discussed by Baker, *ibid*., at pp. 341–343. Another notable procedural fiction developed to enforce debts. The old writ of debt involved the much-despised procedure of wager of law, in which the defendant produced twelve oath-helpers to swear in his favor. *Ibid*., at pp. 6–7. The newer action of assumpsit, a form of trespass on the case, allowed for jury trials of damage claims for breach of promise; however, a rule of the writ system required the use of older writs in cases to which they applied. To avoid this, lawyers for plaintiffs seeking to enforce debts began to allege that the defendant, having contracted a debt to the plaintiff, subsequently promised to pay the debt. The subsequent promise was fictitious, but it was held sufficient to support an action of assumpsit in place of the action of debt. The fictitious allegation of a promise to pay was later used as the basis for claims of unjust enrichment. If, for example, the defendant stole goods from the plaintiff and sold them, the plaintiff could bring an action of assumpsit for the proceeds of sale, based on implied but obviously fictitious promise to pay the money over. This form of implied promise was one

Courts have also employed or acquiesced in fictions for substantive ends. Probably the boldest of these was the common recovery, an action developed in the fifteenth century to avoid the effects of fees tail. A fee tail, authorized by statute in 1285, was an estate in which land was given to a grantee and then to the grantee's descendants for as long as the line of descendants continued. Each holder in effect owned only an estate for life, with title descending automatically and unavoidably to his descendants at his death. Courts, possibly sensing the inefficiency of such an

source of the modern law of restitution. For fuller discussion, see *ibid*., at pp. 389–394, 409–424; John P. Dawson, *Unjust Enrichment* (1951), pp. 10–16. Cases are collected in J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750406-45* (1986), pp. 464–472.

Another interesting procedural fiction was the Bill of Middlesex, which developed out of competition among the royal courts. Baker, *supra* note 43, at pp. 49–51. The court of King's Bench was prohibited by the Magna Carta from hearing common pleas, including actions of debt. See *ibid*., at pp. 46–47 (explaining that the Magna Carta required trial of common pleas at a fixed location, a requirement that disqualified the King's Bench because it theoretically followed the king). However, if a case that otherwise would be tried as a common plea was brought against someone already in the custody of the King's Bench, or if the case arose in Middlesex county, where the King's Bench sat, the King's Bench could hear the claim under a special bill procedure that did not involve a writ and was not subject to the jurisdictional restrictions of the Magna Carta. With this in mind, plaintiffs lawyers devised a scheme. The plaintiff, wishing to bring an action of debt before the King's Bench, began by lodging a fictitious claim of trespass (an action within the jurisdiction of the King's Bench) against the defendant. The trespass claim brought the defendant within the custody of the King's Bench, whereupon the plaintiff brought his bill of debt against the defendant. The court, eager for business, heard the debt claim without closely scrutinizing the claim of trespass on which it depended. The popularity of the bill procedure, which avoided the need to apply to Chancery for a writ, led to a further wrinkle: once it was established that the King's Bench would accept fictitious trespass claims, plaintiffs began to allege that the supposed trespass occurred in Middlesex county. This allowed the plaintiff to initiate both the trespass claim and the debt claim by bill, and avoid the writ procedure altogether. *Ibid*., at p. 51. This fiction resulted in a resurgence of business in the King's Bench, from hundreds to thousands of cases per year.

Another clever device, developed some centuries later, allowed for jury trials of issues in Chancery. The Chancery had no jury procedure. However, parties could obtain a verdict on a contested issue by alleging that they had bet on the fact in dispute, and bringing an action in the law courts to enforce the bet. See *ibid*., at p. 129, n. 71.

estate, developed a rule holding that a sale of land held in fee tail was binding on the descendants of the current holder if the holder left his descendants land of equal value in place of the original land. Once this rule was in place, lawyers devised a clever procedure to cut off the descendants, roughly as follows: the current holder of the fee tail (O) and a potential buyer arranged a collusive suit in which a third party, X (often a lawyer), sued O and claimed, falsely, to be the true owner of the land. O answered X's allegation by naming a fourth party, Y (often a court clerk), and claiming that Y had granted him the land and would vouch for his title. Y either defaulted or admitted that O had no title. In response to Y's default or admission, the court entered judgment awarding title to the land to X, and also entered judgment for O against Y for land of equivalent value. X then transferred the land to the buyer, and O left his judgment against Y for equivalent land to his descendants. This judgment, of course, was worthless, because Y was a nominal party who owned no land. Every step of the procedure was fictitious, and known to be so, but it had the salutary result of freeing up the title to the land.[109]

[109] The common recovery is described in Baker, *ibid*., at pp. 318–321. See *Hethersal* v. *Mildmay*, 6 Co. Rep. 40 (1605), reprinted in Baker and Milsom, *supra* note 108, at pp. 164–169 (resolving that a condition that the grantee of a fee tail may not disentail the estate by common recovery is repugnant to the estate and therefore invalid).

Grant Gilmore described a fiction that permitted assignment of contract rights at a time when intangibles were not transferable. The promisee appointed his intended transferree as an "agent" to collect the debt on his behalf. Over time the courts treated the fictitious agency as irrevocable, meaning for all practical purposes, the transferee now owned the debt. 1 Grant Gilmore, *Security Interests in Personal Property* (1965), p. 202. See Robert A. Hillman, "Contract Lore", *J. Corp. L.* 27 (2002), p. 505, at p. 513 (discussing this and other fictions).

Another early fiction used for substantive purposes involved the benefit of clergy. From the time of Henry II's encounter with Thomas Beckett in the twelfth century, clerics accused of crimes were triable only in ecclesiastical courts and not in the common law courts. By the fifteenth century, common law judges, reluctant to impose the death penalty on all felons as required by law, began to widen the clergy privilege by fictions. First, anyone who could read a psalm was deemed to be a cleric and handed over to ecclesiastical authorities; later, anyone who could recite a psalm was considered a cleric, and, when convenient, a standard psalm was assigned. Baker reports that by the end of the sixteenth century half of all felons were granted benefit of clergy. Baker, *supra* note 43, at pp. 586–589.

Procedural fictions have for the most part become unnecessary and been abolished. Similarly, the fee tail estate has been altered or eliminated through legislative intervention.[110] Nevertheless, courts sometimes still rely on legal fictions to avoid conceptual difficulties or institutional limitations.[111] These legal fictions are deceptive, not in that anyone is expected to believe them, but in that they disguise the process of legal change. Yet, they also serve judicial ends. They enable courts to amend law while maintaining an appearance of continuity. They also downplay the lawmaking function of judges. By portraying themselves as discovering and applying law, courts can deflect concerns about the legitimacy of rulemaking by unelected officials.[112]

[110] Pleading fictions were abolished in England in 1852. Baker, *supra* note 43, at p. 107. Interestingly, the common recovery procedure was so widely accepted that statutory disentailment provisions sometimes refer directly to the fifteenth century action. E.g., 25 Del. C. §302 (2001) (a deed "shall have the same effect and operation for barring all estate tail and other interests in the lands . . . as such persons being a . . . party vouchee to a common recovery").

[111] An example is the doctrine of prescriptive easements. Prescription allows a person who trespasses openly and repeatedly on another's land for a long period of time to obtain an easement, much as the doctrine of adverse possession allows a wrongful possessor to obtain title after a long period of open possession. Both doctrines serve policies of repose. Courts have had difficulty, however, in explaining the legal basis for prescriptive easements. In the case of adverse possession, courts simply refer to statutes of limitation that cut off remedies for repossession of land after a fixed period of time. In other words, the wrongful possessor obtains title by virtue of a legislative act. In the case of prescriptive use, the statutory explanation does not work; a new cause of action arises with every use, and as a result, the statute of limitations never conclusively runs.

Searching for a way to recognize prescriptive easements without simply decreeing that prescription is good policy, courts developed the fiction of a lost grant: if one person trespasses on another's land regularly, openly, and adversely for twenty years, with the passive acquiescence of the landowner, the court presumes that at one time the landowner must have granted an easement, which has since been lost. See, e.g., *Lunt* v. *Kitchens*, 260 P.2d 535, 537 (Utah 1953); *Shellow* v. *Hagen*, 101 N.W.2d 694, 697 (Wisc. 1960). In this way, the court can recognize the easement and neatly circumvent the problem of judicial authority to transfer property rights from one person to another. The reasoning is transparently fictitious, but convenient.

[112] Cf. Baker, *supra* note 43, at pp. 223–230 (discussing medieval understandings of the role of courts and subsequent changes in judicial attitudes toward lawmaking).

3. *Legal Rules*

We have argued previously that, in a sense, legal rules themselves are deceptive.[113] The object of legal rules is to resolve uncertainty and disagreement about what to do in a manner calculated to serve agreed ends.[114] Often the most effective way to do this is to establish a determinate rule, requiring all actors to follow a certain course of action in certain circumstances.[115] Individual actors applying their own best judgment are likely to err, either because they lack information about the consequences of their actions, or because they cannot anticipate what others will do. A rule can reduce errors by bringing superior information to bear and by coordinating individual actions.[116]

Determinate rules, however, are imperfect. To be effective in preventing error and settling controversy, a rule must simplify and generalize in ways that produce the wrong result in some cases that

[113] Larry Alexander and Emily Sherwin, "The Deceptive Nature of Rules", *U. Penn. O. Rev.* 142 (1994), p. 1191.

[114] In some cases, when other values are controversial, peace and order may be the agreed ends. See Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (2001), pp. 11–25).

[115] There may be cases in which an indeterminate standard of conduct is preferable, perhaps to allow experimentation and private development of norms. On the distinction between rules and standards, see, e.g., Isaac Erlich and Richard A. Posner, "An Economic Analysis of Legal Rulemanking", *J. Legal Stud.* 3 (1974), pp. 257, 261–271; Louis Kaplow, "Rules Versus Standards: An Economic Analysis", *Duke, L. J.* 42 (1992), pp. 557, 560–562; Duncan Kennedy, "Form and Substance in Private Law Adjudication", *Harv. L. Rev.* 89 (1976), pp. 1685, 1695–1701.

[116] For general analysis of the function of rules in avoiding errors, see Joseph Raz, *The Morality of Freedom* (1986), pp. 70–80; Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991), pp. 149–155.

For sources recognizing the function of rules in providing expert guidance, see, e.g., Tom Campbell, *The Legal Theory of Ethical Positivism* (1996), pp. 51, 58; Schauer, *supra* at pp. 150–152, 158–159; Jules L. Coleman, "Authority and Reason", in R. George (ed.), *The Autonomy of Law* (1996), pp. 287, 305.

On the coordination function of rules, see, e.g., Raz, *supra* at pp. 49–50; Schauer, *supra* at pp. 163–166; Gerald Postema, "Coordination and Convention at the Foundations of Law", *J. Legal Stud.* 11 (1982), pp. 165, 172–186; Donald H. Regan, "Authority and Value: Reflections on Raz's Morality of Freedom", *S. Cal. L. Rev.* 62 (1989), pp. 995, 1006–1010.

fall within its terms.[117] This means that individuals will sometimes do better, in terms of the objectives of the rule, if they disobey.

Nevertheless, from the point of view of the lawmaking authority, it may be best to insist that everyone follow the rule in all cases. If individuals attempt to determine when the rule yields correct results and when it does not, they will make the same errors the rule is supposed to prevent. As long as the sum of error is less if all actors obey than if all reevaluate the accuracy of the rule in each case, the ends of the rule will be better served by universal compliance.[118]

Accordingly, to obtain optimal results, the lawmaking authority must avoid presenting its rule as a rule of thumb, to be followed unless some other course of action appears more likely to serve the purposes of the rule. It must instead offer the rule as a requirement applicable in every case it governs. Another way to put this is that, although the authority's rules are in fact imperfect rules, prescribing actions that will produce good results in most but not all cases, the authority must present them as perfect rules, stating what should, invariably, be done. It must deceive its subjects by stating the rules in absolute terms and suppressing their flawed and instrumental character.

Perhaps this should not count as "deception" if the authority is prepared to enforce the rules according to their terms. It then becomes true that people should always follow the rule, at least if they wish to avoid sanctions.[119] However, no legal system can

[117] See, e.g., Schauer, *supra* note 116, at pp. 31–34, 47–54 (discussing the over-inclusiveness and under-inclusiveness of determinate general rules, in relation to their underlying objectives). A rule that specified exactly what to do in all contingencies would be hopelessly complex; a rule that simply referred to the ends to be achieved would fail to prevent error and settle controversy.

One exception to the observation that determinate rules are imperfect is a coordination rule that simply designates one of several equally convenient alternatives, and from which there is never a reason to deviate.

[118] We analyze this difficulty in depth in Alexander and Sherwin, *supra* note 114, at pp. 53–95.

[119] This raises interesting questions about the extent to which negative effects of sanctions, both on the actor and on others, count as reasons to obey, and what should follow if the actor nevertheless justifiably or nonculpably wishes to disobey. See *ibid.*, at pp. 77–84 (discussing various difficulties affecting sanctions); Heidi M. Hurd, *Moral Combat* (1999), pp. 208–213 (discussing possible reasons for and against imposing sanctions on justified actors).

detect, much less punish, all violations of its rules; instead, the legal system relies on individuals' taking the rules to be conclusive reasons for obedience even in the many instances in which individuals can disobey the rules with impunity. Moreover, even when violations are detected, announced rules are not always and fully enforced.

Adjudication is a central feature of American law: we have an extensive system of courts, authorized to settle disputes that arise under rules and equipped for the purpose with a variety of civil and criminal remedies. The court system, as well as the rules themselves, carry the implication that when disputes arise, they will resolved according to the rules. If the rules of contract law state that a valid contract gives the promisee a right to the benefit of his bargain, it is natural to assume that courts will use their remedial powers to enforce that right.

Yet, because rules are imperfect, cases will arise in which an individual actor has rightly broken a rule. That is, judged by the purposes of the rule, the actor was justified in violating it. Cases will also arise in which the actor, although not justified in breaking the rule, is not morally blameworthy. The promisee may have overreached in ways not captured by the rules of contract formation, and in the circumstances a breach by the promisor may seem excusable, if not admirable. In situations of this kind, it is difficult and possibly immoral for courts to strictly enforce the applicable rule.[120]

Courts typically carry through on the systemic implication that rules will be enforced according to their terms. In difficult cases, however, courts often find ways to deviate quietly from announced rules of conduct.[121] For example, they may invoke little-known

[120] For discussion of the morality of punishing justified actors, see Hurd, *supra* note 119, at pp. 203–225, 253–293 (identifying but ultimately rejected reasons for punishment). For analysis of the difficulties of full enforcement of rules, see Alexander and Sherwin, *supra* note 114, at pp. 77–86.

[121] For discussions of the possibility of maintaining distinct sets of conduct rules and decision rules within a legal system, see Gerald J. Postema, *Bentham and the Common Law Tradition* (1986), pp. 403–408, 448–452 (interpreting Bentham); Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law", *Harv. L. Rev.* 97 (1984), p. 625. See also Schauer, *supra* note 116, at pp. 648–650 (suggesting that punishment for rule violations be limited to those whose violations were in fact unjustified).

exceptions to the rules, or they may modify the outcome of the rules by choosing limited remedies. Thus, in a contract dispute the court might acknowledge that a breach has occurred but refuse to give the remedy of specific performance and instead limit the plaintiff to a damage remedy. The damage remedy in turn, although in theory designed to give the plaintiff the monetary value of the bargain, may in fact fall short because of hidden limitations and costs. When the various remedial details are worked out, the plaintiff may not receive the full value of his bargain with the promisor, and so may not realize his supposed legal entitlement.[122]

Of course, remedial doctrines and other limitations on enforcement are part of the set of rules governing any legal right and are available to those who can navigate legal sources. Yet, if the basic rules of conduct are clearly and prominently announced, while limiting doctrines are relatively obscure, the limitations may not be noticed and when noticed may not be fully understood. If so, there is a disparity between what the system leads ordinary citizens to expect and what they actually obtain from adjudication of a dispute.[123]

This is not to say that lawmakers set out deliberately to mislead citizens about either the bluntness of the rules or the existence of qualifications that may limit full enforcement. More likely, these features of the system evolve without design and are made use of without being the focus of anyone's attention.[124] The result, however, is that law is not always what it appears to be.

---

[122] For a fuller discussion , see Emily L. Sherwin, "Law and Equity in Contract Enforcement", *Md. L. Rev.* 50 (1991), pp. 253, 300–314. Dan-Cohen points to a number of similar examples in criminal law, such as lesser evils defense. Dan-Cohen, *supra* note 121, at pp. 632–634.

[123] A similar but somewhat more benign possibility is that courts and legal scholars may sometimes repeat morally attractive propositions of "law" which are practically unattainable and therefore not in fact reflected in the outcomes of legal disputes. Robert Hillman has traced examples of this phenomenon in the field of contracts. Hillman, *supra* note 109, at p. 515 (discussing "contract lore," which "represents contracts people's aspirations – their strong preference for how contract law should operate if realities did not preclude it").

[124] For interesting discussions of the possibility of self-deception, see Goldman, *supra* note 22, at pp. 67–71, Nyberg, *supra* note 1, at pp. 81–108.

III. LAW AND MORALITY

A. *Summary and Observations*

Predominant moral theories either prohibit lying absolutely or adopt a strong rule or presumption against lying, subject only to narrow exceptions. The most stringent non-consequentialist theories hold that lies are inherently offensive to natural law, the humanity of the liar, or linguistic imperatives. Other non-consequentialist theories condemn most if not all lies because of the harm they cause to the autonomy of the person lied to. Another essentially consequentialist form of argument focuses on the harm lies cause to the social foundation of mutual trust. Philosophers of various stripes also tend to distinguish between lying and non-lying deception, with the sharpest distinctions drawn by those who view lying as intrinsically wrong.

Legal treatment of deception begins with a seemingly broad prohibition that does not distinguish between lying and non-lying deception. Details of legal doctrine, however, cut back on the initial prohibition. In some contexts, much narrower rules apply. More generally, requirements such as concrete harm, justified reliance, and materiality limit legal relief for proven deception and defer significantly to extra-legal custom. Although legal rules governing deception have tended to become stricter over time, the exemptions and qualifications we have described are still a vital part of the law.[125] In addition, legal prohibitions against deception sit side by side with the law's own willingness to use or endorse deceptive practices in furtherance of systemic ends.

These general descriptions suggest that law diverges importantly from moral theory. Legal rules are more lenient than most moral theories, at least with respect to lies, and they deviate markedly from the logic of leading deontologial theories. To some extent, the comparative leniency of law may be due to institutional limitations on law: perfect enforcement of moral standards is not possible, and the means for approaching perfect enforcement would not be desirable. Yet our descriptive summaries suggest some substantive divergence as well.

[125] See Farnsworth, *supra* note 38, at pp. 409, 419 (noting trends); Prosser and Keeton, *supra* note 38, at pp. 739, 751–752, 759 (noting trends).

Turning to particular moral theories, legal rules do not track, even loosely, arguments based on the liar's violation of natural law, his own humanity, or the rules of language. If these arguments were influential, one would expect to see criminal laws extending beyond property transactions and tort rules permitting recovery without proof of pecuniary damage. Further, because the logic of these arguments depends on the evils of false assertion, one would expect legal rules inspired by them to distinguish pointedly between lying and non-lying deception. And, of course, one would not expect the exemptions and qualifications that provide legal immunity to some forms of lies.

Nor does law correspond to moral theories that emphasize the effect of deception on the victim's autonomy. Law is certainly concerned with preventing and compensating for harm to victims of deception, but it seldom addresses injuries one might associate with autonomy. If autonomy were the focus of legal concern, one would expect regulation of fraud in sexual relations, which is in essence an affront to autonomy. One would also expect to see criminal and civil remedies that vindicated an interest in freedom from manipulation, with or without accompanying economic harm. A few decisions appear to recognize such an interest, but courts do not regularly protect a free-standing autonomy-based right not to be deceived. Instead, they prohibit deception as a means of causing harm to independently recognized interests, such as the interests in bodily integrity, property, physical liberty, and reputation.

Legal rules governing lying and deception are more compatible with the branch of moral theory that focuses on harm to the background of trust within society. The law's evenhanded treatment of lies and non-lying forms of deception is consistent with the goal of maintaining critical levels of trust. The requirement of justified reliance, with its content often drawn from custom, can be explained as excluding behavior that does not affect trust because it is not heeded by typical members of society. Fiduciary duties can be explained as providing added protection when trust is deemed particularly important, either for economic or institutional reasons or

because of special human vulnerability in matters such as health or religion.[126]

Yet, the correspondence between legal treatment of deception and moral theories concerned with trust is not perfect. A legal regime that placed overriding importance on preservation of a social atmosphere conducive to trust would penalize deception even when no victim was actually misled. Our law, in contrast, requires proof that the victim believed and relied. More generally, legal regulation of deception fails to conform to the near-absolute rule recommended by moral theorists who focus on the importance of trust. At best, therefore, law conforms to arguments based on trust only insofar as they are cast as part of a broader consequentialist theory that admits the possibility that competing goods may take priority over trust.

In sum, the pattern of legal regulation betrays an ambivalent attitude toward deception that departs from much of moral theory and is not unlike the position sketched by David Nyberg. Legal rules attempt to remedy significant concrete harms that follow from lies and deception, and they plausibly seek to maintain a level of trust. At the same time, they fall short of consistent, principled condemnation, and their frequent reference to customary practice suggests that they acknowledge the social functions of deception.

B. *Possible Reasons for Legal Divergence from Moral Theory*

We have shown that legal regulation of deception is at odds with most moral positions on deception. In this section, we suggest some possible reasons why law does not regulate deception more pervasively. Some of these reasons are practical and institutional and therefore help to explain the gap between law and moral theory. Others, however, indicate a more substantive divide. We suspect that all these reasons are at work to varying extents.

1. *High Costs of Regulation*

One possible explanation for legal tolerance of deception is that the costs of regulation are too high. This explanation is consistent with the position that deception is seriously wrong in all or nearly

[126] An example of an institutional reason to give special protection to trust is the bond between lawyer and client that is deemed essential to adversary legal procedures.

all cases. Given scarce resources, a society might wish to eradicate deceptive behavior and yet conclude either that practical considerations rule out full enforcement or that other values take priority. This explanation posits that lawmakers have given up, reluctantly, on the ideal of eliminating deceptive behavior.

Several types of costs are involved in regulating deception. The most obvious are administrative costs of enforcing legal claims. Deception can be difficult to detect, even after the fact.[127] Moreover, even when claimants are prepared to prove that deception occurred, dispute resolution imposes costs on both the private parties involved and collectively funded legal institutions. If these costs are too great to bear in light of other needs, lawmakers must narrow the scope of regulation, for example by denying legal recourse to those who have not suffered measurable economic harm.[128]

Another cost frequently cited by courts and legal commentators as a reason to limit relief for deception is the shadow cast over completed transactions by the possibility of damages or rescission.[129] Concern for the stability of transactions might, for example, support a materiality requirement that screens out minor misrepresentation.[130] This cost must be discounted in the context of intentional misrepresentation, because guilty defendants are not likely to be taken by surprise when their transactions are overturned. Yet, transactional instability remains a problem insofar as courts err in determining whether an intentional misrepresentation has in fact occurred.

A third cost of pervasive legal regulation of deception is too much official intrusion into private life. Costs of this kind are especially

[127] Michael R. Darby and Edi Karni, "Free Competition and the Optimal Amount of Fraud", *J. L. and Econ.* 16 (1973), pp. 67, 68–77 (analyzing cases in which providers of repair service falsely diagnose a need for the service).

[128] A caveat to this point is that the capacity of the legal system may be at least as influential in determining the number of disputes litigated as the recognition of particular causes of action. See George L. Priest, "Private Litigants and the Court Congestion Problem", *B. U. L. Rev.* 69 (1989), p. 527 (arguing that the effect of congestion on litigation decisions produces a litigation equilibrium that is independent of the content of decisional standards).

[129] See, e.g., Prosser and Keeton, Torts, *supra* note 38, at p. 753 (discussing materiality); cf. Farnsworth, Contracts, *supra* note 38, at p. 400 (discussing rescission for defects in the bargaining process).

[130] See Prosser and Keeton, *supra* note 38, at p. 753.

worrisome in connection with relief for emotional and dignitary harms resulting from deception. Consider, for example, the case of *Earl* v. *Saks*, in which the donee of a fur coat colluded with a store clerk to disguise the full price of the coat. To make an accurate assessment of intangible harm suffered by the donor, a court would need to know, among other things, the nature of the relationship between donor and donee and the reason for its demise. Although courts do sometimes undertake investigations of this kind – for example, in determining damages for wrongful death – the process of judicial factfinding is a blunt tool for the purpose.[131] Moreover, even if factfinding were reliable, state intervention in the details of human interaction runs contrary to the ideals of privacy and personal liberty. For this reason, intervention itself counts as a cost.[132]

Thus, pervasive regulation of deceptive conduct would entail costs of various magnitude. Yet, none of these costs is an absolute bar to more stringent regulation than now exists. Without an unprecedented expansion of legal machinery, courts could, for example, discard the notion that reliance on misrepresentation must be justified, and extend relief to a wider field of intangible harms resulting from deception. Courts have long taken a stricter approach

[131] On damages for wrongful death, see generally Dobbs, *supra* note 38, at pp. 439–445. The tort of intentional infliction of emotional distress is now well established. However, courts have been careful to limit it to "extreme and outrageous" conduct causing "serious" distress. See Restatment (Second) of Torts §46 and comment b (1977).

[132] See, e.g., *Restatement (Second) of Torts*, comment d (1977) ("There is no occasions for the law to intervene in every case where some one's feeling are hurt. There must still be freedom to express an unflattering opinion . . .").

For an interesting judicial excursion into the details of private life, which suggests both the difficulty of accurate fact-finding and the intrusiveness of the intervention, see *Sharp* v. *Kosmalski*, 351 N.E.2d 721 (1976), in which a farmer, age 56, deeded his property to a schoolteacher, age 40, in the hope that she would marry him. When she later refused to marry him and evicted him from the farm, the court found her conduct contrary to the understandings inherent in the relationship, and imposed a constructive trust.

Feminists have often observed that the state of the law, including not only its explicit requirements but also its omissions, inevitably shapes private life. Without denying that law has this effect, we think that adjudicatory scrutiny of the details of human interchange to identify behavior such as fraud raises distinct concerns for a legal system.

to wrongs such as battery, defamation, and trespass to land.[133] They also tighten the reins on deception itself when deception occurs in the context of a relationship deemed to be fiduciary. Accordingly, costs of regulation cannot be the only reason why law tolerates many instances of deception.

2. *Superiority of Informal Enforcement*

Another possible explanation for imperfect legal regulation is that the legal system defers to informal social processes to control deception. For example, legal remedies might be limited to tangible harm on the assumption that peer groups are better able both to evaluate intangible harms from deception and to punish the deceiver by expressing their disapproval. Similarly, law might exempt from regulation statements made in the context of sexual relations, or statements of opinion or intention, on the assumption that peers have a better understanding of the implications of statements of this kind.

Informal enforcement of norms of deception has several advantages over formal legal enforcement. It avoids the direct institutional costs of legal enforcement because it relies on naturally occurring social processes such as gossip, ostracism, and character signalling.[134] At least in some contexts, informal processes may result in more sensitive factfinding. Those who know the parties may have insights about their intentions and understandings that would elude a court.[135] Social sanctions also may be more effective and more satisfying to victims, particularly when the consequences of deception are not monetary. Finally, although informal enforcement relies on community oversight of conduct, it at least avoids intrusion by the state and its organized means of coercion.

---

[133] See text at note 54, *supra*.

[134] See Eric A. Posner, *Law and Social Norms* (2000), pp. 18–27 (proposing that people adopt and conform to norms as a way to signal their cooperative natures).

[135] Theories of evolutionary psychology suggest that humans have evolved specialized abilities to detect cheating in their interactions with others, and also to detect traits such as trustworthiness in partners. See Thomas A Smith, "Equality, Evolution, and Partnership Law", *J. of Bioeconomics* 3, pp. 99, 110–114 (discussing the literature and suggesting its application to partnership law).

In principle, a shift of responsibility from legal to non-legal enforcement mechanisms can be reconciled with the view that deception is always or nearly always wrong. A society might conclude that deception should be eliminated to the greatest extent possible but that the goal of elimination is best served by allowing social processes to operate without interference.[136] In practice, however, social norms are not entirely condemnatory of deception, at least not to the extent recommended by moral theory. To take one of many examples, those who understate their willingness to buy in negotiations with a car dealership are not ostracized by society.

Moreover, legal rules sometimes incorporate norms that, rather than penalize deceivers, require potential victims to be on their guard. For example, the requirement of justified reliance implies that victims bear responsibility if they fail to live up to a standard of common sense. Similarly, sellers are not liable for puffing because "buyers are expected to understand that they are not entitled to rely."[137] According to the *Restatement (Second) of Contracts*, misrepresentation is not actionable if the victim failed to act "in good faith and according to reasonable standards of fair dealing."[138] In these cases, the legal system, through its reliance on informal norms, shifts responsibility to the victim to prevent harm.

Thus, deference to informal enforcement does not necessarily reconcile law and moral theory; it can equally be viewed as confirming that law sometimes treats lying and other deception as benign. Nor can informal enforcement explain all the instances in which law allows deception. As will appear in the next section, some elements of legal doctrine are more easily interpreted as protective of deception than as designed to control costs or shift responsibility.

---

[136] Cf. David Skeel and William Stuntz, "More Law Won't Work", *Int'l Herald Tribune* (July 11, 2002) (arguing that enactment of new criminal laws in the wake of the Enron and WorldCom scandals is futile because "[c]riminal laws lead people to focus on what is legal rather than what is right.").

[137] Restatement (Second) of Contracts §169, comment b (1981).

[138] Restatement (Second) of Contracts §172 (1981).

3. *Benefits of Deception*

A third possibility is that law exempts some forms of deception from regulation, not because they are unreachable or better reached by other means, but because they are desirable. In other words, society has determined not to intervene to prevent or punish certain instances of deception, including instances of lying, because it does not wish to eliminate them. To the extent this explanation is correct, law is evidently in conflict with both non-consequentialist moral theories and with those consequentialist theories that endorse a rule against deception.

Some potential benefits of deception are fairly obvious. In the right circumstances, deception can prevent serious harm, as in the case of the murderer who asks whether the victim is at home. Deception can be helpful in paternalistic ways, as when friends and family conceal bad news from a sick person, or simply civil, as when a guest claims to have enjoyed dinner. Concealment of one's own personal failings or flaws can bolster self-confidence in dealing with others. These benefits are thought to be irrelevant by strict deontologists such as Kant and insubstantial by consequentialists such as Mill, but they often affect practical decisions.

More interesting for analysis of law are instances of efficient deception: deception that benefits the deceiver at the expense of his victim, and yet, if permitted by law, will tend to maximize overall welfare. Efficient deception is a counterintuitive notion: deception typically meets with strong disapproval from welfare economists. The most obvious reason for this is that by inducing false beliefs, deception undermines the normal assumption that consensual transactions produce mutual benefit.[139] Deception may also lead to inappropriate use of resources, and to unproductive expenditures both on deception itself and on protecting against deception.[140]

Nevertheless, legal scholars have identified various situations in which non-disclosure or fraud may have economic benefits. For example, Anthony Kronman has argued that a legal right to withhold pertinent information in contractual negotiations can provide incentives to gather information, which in turn will increase the likelihood

[139] See Richard A. Posner, *Economic Analysis of Law*, §4.6, 6th edn. (2003).

[140] Robert Cooter and Thomas Ulen, *Law and Economics*, 3rd edn. (1999), p. 276.

of efficient exchange. More specifically, Kronman recommends that liability for nondisclosure in ordinary contractual settings should be limited to information acquired casually and should not extend to information that can only be acquired through effort. A homeowner who learns by observation that his home is infested with termites has not conducted a search for valuable information and therefore should be required to disclose his information to a buyer. But a buyer who determines through geological investigation that minerals lie under a parcel of land should be allowed to suppress his discovery in negotiations to buy the land, so that future buyers will have reason to invest in geological research.[141]

Others have argued that even when information is acquired casually, a rule permitting informed parties to trade without disclosing what they know is desirable because it encourages useful speculation. Speculative trading moves market prices in a direction that reflects the speculator's information, and the resulting price changes send signals that guide efficient decision-making about resource use. If trading on private information is prohibited, parties with information will have no incentive to reveal it, and it may not reach the market.[142]

---

[141] Anthony T Kronman, "Mistake, Disclosure, Information, and the Law of Contracts", *J. Legal Stud.* 7 (1978), pp. 1, 9–13. See Posner, *supra* note 139, at §4.6 (discussing termites).

Kronman's analysis is not universally accepted. Kim Scheppele, for example, argues that Kronman both fails to account for the pattern of decided cases and underestimates the inefficiencies that follow from lack of information. See Kim Land Scheppele, *Legal Secrets* (1988), pp. 32–36, 161–167. To arrive at her own position on nondisclosure, Scheppele employs a contractarian analysis, which yields a principle of equality of information. This principle in turn dictates that "deep secrets" – those the uninformed party does not suspect to exist – must be disclosed. See *ibid*., at pp. 119–124. See also Alan Strudler, "Moral Complexity in the Law of Nondisclosure", *U. C. L. A. L. Rev.* 45 (1997), pp. 337, 349–384 (rejecting the positions of both Kronman and Scheppele, and proposing instead that liability for nondisclosure should be resolved according to a deontological principle of "deserved advantage" in bargaining).

[142] See Christopher T. Wonnell, "The Structure of a General Theory of Disclosure", *Case W. Res. L. Rev.* 41 (1991), pp. 329, 351–360 (also noting costs of speculation that make futures markets preferable to direct buying); Randy E. Barnett, "Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud", *Harv. J. L. and Publ. Pol.* 15 (1992), pp. 783, 797–799. In general, lack of information affecting supply and demand

Saul Levmore has pointed out that rules permitting those in possession of information to trade without disclosure are not enough to secure benefits of this kind. If courts are serious about encouraging production and revelation of information through trade, they must also permit false assertions. Otherwise, a party who lacks information can always ask a blanket question such as, "Do you have information pertinent to the value of the goods?" If a false answer to this question triggers liability for fraud, incentives to search or reveal will be lost.[143] The impact of this reasoning can be seen in contract rules providing that reliance on a statement of intention is not justified if misstatements of intention are "consistent with reasonable standards of dealing."[144]

Levmore has also suggested another way in which deception can be efficient. In cases of situational monopoly, non-disclosure or affirmative fraud can preempt hold-out strategies. Suppose, for example, that a developer needs to make a series of land purchases to support a project. If the developer's plan is known, opportunistic landowners may demand high prices. Yet profits secured by hold-out sellers are monopolistic, and the sellers' demands may ultimately defeat an otherwise efficient plan. If the developer is permitted to suppress or even lie about his intentions for the land, the hold-out problem may not arise.[145]

---

leads to inefficient use of resources. For example, both Wonnell and Barnett cite *Laidlaw* v. *Organ*, in which a buyer purchased tobacco without revealing his knowledge that the war of 1812 had ended. Without information about a peace treaty, farmers might avoid planting tobacco. However, a large speculative purchase will signal increased demand, telling farmers to plant. But without the opportunity to profit from trade, those in possession of the information have no reason to reveal it through action. See Wonnell, *supra*, at pp. 352–353.

[143] Saul Levmore, "Securities and Secrets: Insider Trading and the Law of Contracts", *Va. L. Rev.* 68 (1992), pp. 117, 140. See also Barnett, *supra* note 142, at pp. 799–801. Barnett writes from a perspective that emphasizes consent rather than efficiency. He points out that if parties to an exchange could ask blanket questions about pertinent information and demand truthful answers, the practice "would virtually eliminate the institution within which both buyer and seller are operating." Accordingly, Barnett proposes a rule holding that misrepresentation about "extrinsic" conditions affecting supply and demand should not count as a defense to contractual obligation.

[144] See text at notes 74–75, *supra*.

[145] Levmore, *supra* note 143, at pp. 140–144.

Along similar lines, Christopher Wonnell has proposed that suppression of information can have economic benefits whenever one party is in a position to take action that will raise the value of others' property but lacks sufficient incentives to do so. In such a case, allowing the potential actor to buy the position of those who will benefit without disclosing his plans adds an incentive for him to carry out the beneficial act. Suppose, for example, that a developer is considering a project that will incidentally raise the value of surrounding land. Profits from the project alone are not sufficient to support an investment; however, taking into account the positive externalities it confers on surrounding property, the project represents an efficient use of resources. Although no information-gathering or hold-out problems are present, under the right conditions a privilege that allows the developer to withhold information in negotiations to buy the surrounding land – or, by Levmore's extension, to lie – may allow the project to go forward.[146]

Deception may have other economic functions. In some circumstances, deception might encourage efficient exchange by facilitating division of surplus gains from trade. Suppose a potential buyer and seller are discussing a simple exchange of cash for goods. The buyer in fact values the goods more than the seller, so the contemplated exchange is efficient. To fix a price, however, the parties must agree on how to divide the mutual benefit resulting from the trade. If they cannot allocate this surplus satisfactorily, no transaction will occur.

Of course, parties often succeed in dividing surplus. Their ability to do this has been the subject of much study. Game theory predicts that in an idealized division of known surplus, all else being equal, rational parties will quickly offer and accept a roughly equal division of gains in order to avoid the costs of further delay.[147] The solution of equal division, however, assumes that the parties are

[146] See Wonnell, *supra* note 142, at pp. 346–351.

[147] Douglas G. Baird, Robert H. Gertner and Randal C. Picker, *Game Theory and the Law*, pp. 220–224 (describing Rubenstein bargaining games). This prediction is based on the assumption that the value of the sum to be divided decreases over time as offers and counter-offers are made. The prospect of this loss, combined with a process of backward induction about possible offers and counter-offers, yields a near equal division at the outset. If, however, the parties do not have equal discount rates, the solution will diverge from equality.

rational, the amount of surplus is known, and there are no alternatives other than to agree on a division or to lose the opportunity for profit.[148] If these conditions do not hold true, there may not be a unique solution to the game and bargaining may break down.[149]

See also Smith, *supra* note 135, at pp. 100–103 (suggesting that equal division of gains is a predomienant solution to bargaining, and hence a sound legal default rule, because bargaining power is likely to be normally distributed in the population).

[148] See *ibid.*, at pp. 220–232 (applying the model to a situation of observable but not verifiable valuation, in which legal rules provide an exit option for one party).

[149] Game theory may reveal other situations in which deception is advantageous. Suppose, for example, that a society has determined collectively that the privacy of certain information, such as marital status, disability, or genetic predisposition to disease, should be protected by a rule that prospective employers may not inquire about the subject in question. This policy, of course, endorses nondisclosure. The interesting point, however, is that the no-inquiry rule will be ineffective to protect privacy unless people are also allowed or even encouraged to lie. If lying is prohibited, those with desirable qualities (unmarried, not disabled, resistant to disease) will volunteer information, their information will be credible, and employers will infer negative information from silence. If, however, applicants are permitted to lie, disclosure of desirable qualities will not be credible and so will not take place. See Baird, Gertner and Picker, *supra* note 147, at pp. 92–93.

Another example is this: suppose there are no rules requiring disclosure about the condition of furnaces in homes for sale. Buyers know that half of all homes for sale need new furnaces. They are willing to pay $180 for a home that definitely needs a furnace, $200 for a home that definitely does not, and $190 if they know nothing about the state of the furnace. Many but not all sellers can find out whether their homes need new furnaces for $5. Under these circumstances, sellers who can find out for $5 whether they need furnaces will do so; then those who do not need furnaces will disclose (in order to obtain a price of $200) and those who do will remain silent (to keep the price at $190). As long as some sellers do not know the condition of their furnaces (because finding out would cost them more than $5), buyers cannot infer from silence that the price should be $180. If we assume that advance information about the need for a furnace has only distributive consequences, the costs incurred by sellers to obtain this information has no social value. See *ibid.*, at pp. 100–103. A rule requiring all sellers both to have their furnaces checked and to disclose the results is undesirable because it would cause sellers with high discovery costs to pay more than the information is worth to anyone. Baird, Gertner and Picker instead propose a rule that any information gathered must be disclosed, and demonstrate that this rule would have the effect of preventing anyone from disclosing. *Ibid.*, at p. 102. A rule allowing sellers to misrepresent the state of their furnaces seems at least as effective and possibly superior because it entails fewer systemic costs.

Evolutionary theory may give reason for greater optimism about division of surplus. Evolutionary theory suggests that humans may be predisposed to share in ways that facilitate cooperative bargaining. In particular, if willingness to share the gains of joint ventures equally with one's partners increases one's chances of forming successful ventures, willingness to share may evolve culturally or even biologically as a dominant psychological trait.[150] The evolved preference for sharing may in turn enable parties to a particular bargain to fix more easily on an equal division of surplus. And in fact, bargaining experiments suggest that, when all else is equal, partners favor equal division, even when one party is assigned an entitlement that would allow that party to demand a larger share.[151]

Yet, even if we assume that humans are disposed to equal sharing, this preference may give way to other influences in actual negotiations. For example, in bargaining experiments, when conditions are altered to suggest that the party in control has earned the entitlement to a greater share, the division of gains shifts away from equality.[152] This suggests that in an actual exchange, agreement may

[150] Tom Smith describes a population composed of greedy partners who insist on 2/3, easy partners willing to accept 1/3, and fair partners disposed to equal division. If successful partners replicate while unsuccessful partners do not, the distribution of sharing preferences is likely to evolve over time to a stable equilibrium of near-universal preference for equal sharing. Smith, *supra* note 135, at pp. 104–108. See also *ibid*., at pp. 110–116 (collecting and explaining materials on evolution of social skills and dispositions); "Why We're So Nice: We're Wired to Cooperate", *New York Times* (Tuesday, July 23, 2002), pp. F1–F8 (reporting brain imaging studies linking cooperation to reward/pleasure centers in the brain).

[151] See Elizabeth Hoffman and Matthew L. Spitzer, "The Coase Theorem: Some Experimental Tests", *J. L. and Econ.* 25 (1982), p. 73 (discussing the results of ultimatum games in which a coin flip enabled one party either to choose a fixed sum for himself or to offer to share a slightly larger sum, in proportions of his choosing, with a partner; subjects chose cooperation and equal division). Elizabeth Hoffman and Matthew Spitzer, "Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice", *J. L. Stud.* 14 (1985), pp. 259, 259–261.

[152] Elizabeth Hoffman and Matthew Spitzer, "Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice", *supra* note 151, at pp. 259, 259–261 (finding that subjects were more likely to divide gains unequally in ultimatum games when the controlling party won the right to divide the sum in a competitive game, or when instructions included an authoritative statement that winning the coin toss meant the controller

be elusive if both parties have a sense of earned or at least justified entitlement to the goods or cash they bring to the bargain. Experiments also suggest that the preference for equal division falters when conditions are manipulated to increase the decision-maker's anonymity.[153] Thus, in real bargains, a low likelihood of reciprocity may decrease the chances of a successful division of surplus.[154] Parties' attitudes may also be influenced by the effects of endowment on valuation,[155] and by the various irrationalities that affect all human negotiation.

These various theories of behavior suggest that although cooperation is possible, it will sometimes fail and efficient bargains will be lost.[156] Against this background, a possible benefit of deception is its capacity to prevent impasses and smooth the way to trade. Suppose, for example, that a seller falsely maintains that others are interested in his goods, or that he must demand a certain price in order to remain in business. As a result, the buyer may form a false belief that the seller's offer represents a division of surplus that is favorable to him, the buyer; and this belief may lead him to buy.[157]

---

had earned a right to divide the proceeds). The authors infer that bargainers tend to be guided by a Lockean norm of distributive justice in cases of earned entitlement (particularly when this norm is reinforced by authority), and otherwise are guided by a norm of equality. *Ibid*., at pp. 280–284. They also suggest that these norms of distributive justice can help parties solve bargaining problems. *Ibid*., at p. 297.

[153] In other words, sharing may diminish with "social distance." See Elizabeth Hoffman, Kevin McCabe and Vernon L. Smith, "Social Distance and Other-Regarding Behavior in Dictator Games", *Am. Econ. Rev.* 86 (1996), p. 653 (refining dictator games and finding, with qualifications, that the resulting data were "generally supportive of the economic assumption of self-interested behavior").

[154] See *ibid*., at p. 658 (suggesting that expectations of reciprocity account for sharing).

[155] See, e.g., Forest Jourden and Jeffrey J. Rachlinski, "Remedies and the Psychology of Ownership", *Vand. L. Rev.* 51 (1998), p. 1541.

[156] See Robert Cooter, "The Cost of Coase", *J. L. Stud.* 11 (1982), pp. 1, 14–24, 28 (finding the Coase Theorem too optimistic about bargaining and the "Hobbes Theorem" too pessimistic).

[157] Research on advertising suggests not only that puffing by sellers is effective in making sales, but also that buyers continue to believe the seller's exaggeration even if it is not warranted by the actual quality of the product. See Richard L. Oliver, "An Interpretation of the Attitudinal and Behavioral Effects of Puffing", *J.*

Similarly, a buyer may falsely assert that he cannot and will not buy above a certain price. If the seller believes this and believes accordingly that he has done well in the division of surplus, he will sell. Of course, if these bargaining strategies distort beliefs to the point at which either party is wrong in thinking that the basic exchange – cash for goods – will benefit him, they are economically undesirable. Short of that point, however, deception may actually help to overcome various combinations of self-interest, uncertainty, and inflated or irrational valuation that prevent agreement within the realm of dividing surplus.

It is at least possible that this intuition has affected the law. Legal rules that allow puffing and treat statements about value as unworthy of reliance can be explained as facilitating division of surplus. Similarly, the requirement of materiality, to the extent it remains in force, gives courts an opportunity to permit minor deal-facilitating deception without affecting the fundamentals of the exchange.

A final point is that customary tolerance of deception, which as we have noted is often incorporated by legal rules, provides some evidence that deception can be efficient. Some legal rules refer to norms of vigilance by potential victims of deception; these norms say nothing about the efficiency of deception, but only about how best to minimize harm. Some legal rules, however, refer to custom to identify instances of permissible deception. For example, comments to the *Restatement (Second) of Contracts* cite "the propensity of sellers and buyers to exaggerate" the value of their offers as a consideration to be taken into account in determining when a false statement should be deemed a statement of opinion, on which the victim should not have relied.[158] In other words, sellers and buyers have developed a practice of deceiving one another and the law tracks rather than suppresses that practice.

There is reason to think that under some conditions, behavior sanctioned by custom will tend to maximize welfare. Customs

Consumer Affairs 13 (1979), p. 8 (suggesting that puffery creates high expectations that cannot easily be disproved and also affects subsequent evaluations of a product).

[158] Restatement (Second) of Contracts §168, comment d (1981); see Restatement (Second) of Torts §539, comment c (1977) (employing a similar standard).

incorporate experience and localized knowledge.[159] Presumably, groups will converge over time on those practices that bring their members the greatest success. Of course, convergence does not in itself indicate efficiency. If customary practices have costs that fall on outsiders, their endorsement by insiders does not make them desirable from a universal point of view. If, however, the costs of the practice are borne reciprocally by members of the group, group acceptance may be evidence of efficiency.[160] Extending this reasoning to deception, some deceptive practices that are customary within groups are surely designed to benefit insiders at the expense of unsuspecting outsiders.[161] Similarly, some widespread patterns of deception target strangers whom the deceiver is unlikely to

[159] See Francesco Parisi, "Customary Law", in Peter K. Newman (ed.), *New Palgrave Dictionary of Economics and the Law* (1998), pp. 572, 577; Friedrick Hayek, *The Constitution of Liberty* (1960), pp. 61–62.

[160] See, e.g., Richard A. Epstein, "Customary Practices and the Law of Torts", in *New Palgrave Dictionary of Economics and the Law*, *supra* note 159, at p. 579; see also Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991) (demonstrating the ability of member of a close-knit group to generate mutually beneficial cooperative norms); Robert D Cooter, "Book Review", *Cal. L. Rev.* 81 (1993), p. 425 (reviewing Ellickson and explaining connections between the structure of interaction and the efficiency of norms that emerge); Robert D. Cooter, "Structural Adjudication and the New Law Merchant: A Model of Decentralized Law", *Int'l Rev. L. and Econ.* 14 (1994), p. 215 (arguing that norms are efficient when they evolve in a context in which individual incentives for signaling align with public good). Not all accept that customs indicate efficiency. Eric Posner, for example, asserts that the link between social norms and efficiency is "empirically false and methodologically sterile." Posner, *supra* note 134, at p. 172. Posner suggests that optimal behavior in two-party repeat play does not generalize well to multi-party games, that the value of signaling through compliance with norms is indeterminate, and that norms that form in interactions with strangers are likely to respond to coincidental focal points. See *ibid*., at pp. 171–179. Entrenched customs may also fail to respond to changed circumstances. To arguments of this kind, Epstein responds that, while customary behavior may not be optimal, it has advantages over judicial rule-making. In particular, courts focus on particular past acts rather than future patterns of behavior, and the parties arguing before them lack incentives to argue for the most efficient rule. Epstein, *supra*.

[161] For example, Michael Darby and Edi Karni analyze incentives for merchants who provide both diagnosis and service to sell customers services they do not need. Darby and Karni, *supra* note 127, at pp. 68–77.

encounter again.[162] In these cases the fact that the practice is common says nothing in its favor. But when a pattern of deception arises among parties who interact repeatedly with one another, the custom itself may provide some ground for thinking that the deception it allows will facilitate beneficial trade or other social interchange.

To sum up, deception, and sometimes lying, may have social and economic benefits. Some of the possibilities we have listed are speculative, but others are concrete and fairly uncontroversial. Moreover, these benefits provide plausible explanations for a variety of legal rules that tolerate deceptive practices, in come cases more plausible than high cost or reliance on informal enforcement. To the extent that social and economic benefit is the motive behind legal rules governing deception, law evidently has departed in principle as well as in practice from deontological moral theory. It also has arrived at conclusions that differ from those of leading consequentialists.

C. *A Further Conclusion: Legal Doctrine and Legal Rhetoric*

Our analysis of legal rules governing deception suggests that legal doctrine diverges significantly from moral theory, particularly nonconsequentialist moral theory. The pattern of doctrinal requirements and omissions is at odds with deontological theories that hold lying to be either inherently wrong or in violation of the victim's autonomy. Law is surely concerned with maintaining trust, but legal rules fall short of the demands of moral theorists who focus on trust. On close analysis, law appears to be oriented toward social consequences, ready to trade off control of deception against other goals and values, and perhaps willing to pursue benefits from deception.

Nevertheless, as we noted at the outset of our discussion of law, legal rhetoric broadly condemns deception. A first glance at legal sources, including cases, statutes, treatises, and black letter compilations, gives the impression of a strong prohibition that sweeps in all forms of deceptive conduct. To understand the extent to which law tolerates deception, one must seek out doctrinal details and reflect

[162] An example might be lying on resumes. According to a *Time Magazine* report, a survey conducted by a firm specializing in background checks found that 44% of resumes contained lies. *Time Magazine* (June 10, 2002), p. 45.

on the practical application of law to daily life. Some of the limitations imposed on legal liability are difficult to appreciate without considerable research and legal expertise. For example, a seller's false assertion that his goods are "worth $10,000" is not an actionable misrepresentation, but to arrive at this conclusion, one must first learn that (1) no liability follows from a false statement unless the listener "justifiably" relied; (2) reliance on most statements of opinion is deemed to be unreliable; and (3) a claim about value is deemed to be a statement of opinion.[163]

In our earlier discussion of deception within the legal system, we noted other areas of law in which broad legal propositions are qualified by less salient doctrinal and remedial details.[164] Criminal laws may be enacted in comprehensive terms but narrowed by lesser known defenses and procedural filters such as prosecutorial discretion.[165] Contract law may assert that promisors are entitled to the benefit of their bargains, and yet remedial rules permit courts to limit redress.[166] In each case, the rules prominently stated as rules of conduct differ from the rules actually applied by courts to decide disputes. The law governing deception appears to follow a similar pattern.

One possible reason for divergence between rhetoric and doctrine is that law aspires to regulatory ideals it cannot fulfill. Society may be opposed to deception, but unable eliminate it through law. Rather than admit failure and give up the ideal of truthfulness, judges and legal commentators continue to speak as if comprehensive regulation is possible.[167]

Another, less benign possibility is that law states ideals it cannot fulfill in order to create the impression that these ideals describe the law actually enforced by courts. Society may oppose deception but lack the means to regulate it in all its forms. To preserve spontaneous

---

[163] Restatement (Second) of Contracts §§168 and illus. 2, 169 (1981).

[164] See notes 120–124 and accompanying text, *supra*.

[165] See Dan-Cohen, *supra* note 121.

[166] See notes 120–122 and accompanying text, *supra*. Indeed, Robert Hillman has identified at least three more general propositions of contract law that are confidently stated by courts and commentators but are not borne out by judicial decisions. *See* Hillman, *supra* note 109.

[167] See Hillman, *supra* note 109, at p. 515–517.

norms of truthfulness and deter defectors, law overstates the extent of its powers.

Yet another, darker possibility is that legal rhetoric diverges from doctrine when law is in fact ambivalent. Society may take a mixed view of deception, and yet stand to benefit from public belief that deception is prohibited by law. Accordingly, legal sources state what appear to be strong rules against deception and allow the various qualifications to those rules to remain obscure.[168]

The special importance and characteristics of the norm of truthfulness lend some plausibility to this last interpretation in the context of laws regulating deception. Truthfulness is a delicate norm. Suppose that most members of a society value mutual trust and are disposed to do what they can to protect it. If a critical proportion of the population is truthful, particular acts of deception will damage trust, not only directly but also by setting bad examples and suggesting that the norm is not widely observed. Accordingly, those who value trust have reason to avoid deception. If, however, deception is rampant, then one further act of deception does no harm, and no one has reason to forego immediate self-interest in the interest of trust. Thus, the strength of the norm is essential, not only to trust but to preservation of the norm itself. Legal sources can reinforce the norm by repeating the standard of truth and suggesting – deceptively – that deception will meet consistently with legal sanctions.

A further complication, peculiar to deception, is that to the extent deception has benefits in the form of civility, privacy, or efficiency, these benefits also rely on the norm of truthfulness. If nothing is believed, deception will never be successful. In other words, general acceptance of the basic norm of truthfulness is essential both to trust and to successful deception. Therefore, if society is ambivalent about truthfulness, in the sense that it finds some instances of deception to be desirable, it has a further reason to assert that truth is imperative.

[168] In this section we sometimes speak of the law as doing things and having motives. We do not mean to imply that diabolical officials are consciously designing law to operate in deceptive ways in furtherance of intended ends. We simply mean that law has evolved in these ways, and that, either coincidentally or causally, the final product serves the ends we describe.

Thus: if society wishes, through its legal system, to promote truth and minimize deception, it needs to exaggerate the capacity of the legal system to regulate deception. If, in addition, society wishes to take advantage of certain benefits arising from successful deception, it has even more reason to condemn deception and exaggerate the legal system's capacity to regulate. Viewed in this way, the law governing deception, with its broad proscription and many loopholes, is an exercise in institutionalized collective self-deception.

School of Law
University of San Diego
5998 Alcala Park
San Diego, CA 92110-2492
USA