Notre Dame Law Review

Volume 77
Issue 3 *Propter Honoris Respectum*

Article 7

3-1-2002

Lying and Lawyering: Contrasting American and Jewish Law

Steven H. Resnicoff

LYING AND LAWYERING: CONTRASTING AMERICAN AND JEWISH LAW

*Steven H. Resnicoff**

Can desirable ends justify what would otherwise be undesirable means? The answer to this question depends on a variety of factors, including the ends to be accomplished, the means to be employed, the person who would use them, and the parties against whom they would be directed. This Essay focuses on a particular case—lying by lawyers—and contrasts the perspectives of the American and Jewish legal systems. Part I discusses the American rules regarding lying and contends that they are, at least in part, fundamentally undefended and, perhaps, indefensible. Although it is often asserted these secular rules promote public respect for the legal system, there seems to be no persuasive, solid evidence that they do. If anecdotal evidence is accepted, one might be more inclined to believe that the rules undermine such respect. Moreover, the rules have a numbing and corrosive effect on the moral values of the lawyers who observe them, while alienating those who disobey them.

Part II will examine the Jewish law approach, which, by contrast, generally eschews role-differentiated ethics and requires more contextual, nuanced decisionmaking. Moreover, it demands, for the most part, that attorneys, just as lay persons, promote justice—and other values—concretely, in ways to which most people may more directly relate and, at least arguably, respect.

Finally, Part III will explore whether the Jewish law rules provide useful guidance for the possible amendment of America's secular legal ethics prescriptions.

---

* Professor of Law, DePaul University College of Law. B.A., Princeton University, 1974; J.D., Yale Law School, 1978; Rabbinic Degree, Beth Medrash Govoha, 1983; Holder of DePaul's Wicklander Chair for Professional Ethics (2000–2001). I would like especially to thank Mrs. Callista Wicklander and the entire Wicklander Family whose support of the Wicklander Chair helped me to undertake this project. I also thank Professor Michael Broyde for his comments on a draft of this Essay.

I. THE AMERICAN APPROACH

A. A Categorical Imperative Against Lawyer Lying

One of the fundamental distinctions between secular and Jewish legal ethics appears to be that, while secular ethics rules seem to canonize a categorical imperative against lawyer lying, Jewish law generally embraces a more nuanced and contextualized approach. At the outset, however, a few words are in order regarding American, ethics rules. No single code authoritatively and exclusively governs secular legal ethics. Instead, various overlapping systems of laws and regulations affect how secular lawyers behave. These include, for instance, generally applicable federal,[1] state, and local statutes and ordinances, tort law, ethics rules prescribed by state supreme courts and state bars, and ethics codes promulgated by other professional associations to which they belong. Nevertheless, for purposes of making the present discussion manageable, we will for the most part discuss the secular rules as they appear in the American Bar Association's (ABA) *Model Rules of Professional Conduct* (Model Rules).[2]

Model Rule 8.4(c) provides a broad prohibition on lying. In part, it states: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[3]

---

1 The Federal Fair Debt Collection Practices Act, for example, precludes an attorney who regularly engages in collection work from threatening to file suit, even a meritorious suit, against a debtor if the attorney would not in fact recommend to his or her client the lawsuit be filed. *See* 15 U.S.C.A. § 1692e(5) (West 1998 & Supp. 2001).

2 The ABA's first effort to promulgate ethics rules came in 1908, when it adopted the ABA Canons of Professional Ethics. In 1969, it adopted the ABA Model Code of Professional Responsibility (Model Code). Finally, in 1983, the ABA replaced the Model Code with the Model Rules. More than forty American jurisdictions have adopted ethics rules based primarily on the Model Rules. *See generally* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (2001) (discussing the Model Rules along with related topics).

3 In its entirely, ABA Model Rule 8.4 states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Note that this rule is not limited to conduct by the lawyer vis-à-vis a client, a court, an adversary, or an adversary's client. In fact, it is not even limited to conduct by the attorney in his role as an attorney.[4] Instead, it applies to any conduct, even in the attorney's private life, that involves dishonesty, fraud, deceit, or misrepresentation.[5] Nor is the rule restricted to criminal acts, because such acts are dealt with in Rule 8.4(b),[6] or to conduct that is "prejudicial to the administration of justice," for that is the subject of Rule 8.4(d).[7]

The Model Rules contain a number of relatively particularized provisions forbidding dishonesty and requiring candor in different contexts, with the most demanding applying to conduct before courts and other tribunals.[8] Nevertheless, the ABA's Center for Professional Responsibility explains that Rule 8.4(c)'s general proscription against

---

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983). The predecessor to Model Rule 8.4(c) was Model Code Disciplinary Rule 1-102(A), which similarly provided "that a lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1980).

4 *See, e.g., In re* Disney, 922 S.W.2d 12 (Mo. 1996) (en banc) (attorney suspended for six months for misrepresentations in connection with his obtaining a personal loan); *see also, e.g., In re* Greenberg, 280 A.2d 370 (Pa. 1971) (applying Rule 8.4(c)'s predecessor, DR 1-102(A)(4)). *See generally* Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule with a Future*, 74 OR. L. REV. 665 (1995) (discussing the background of the dishonesty rule, its application in the State of Oregon, and its potential problems).

5 *See* Jarvis & Tellam, *supra* note 4, at 667 ("The drafters of the dishonesty rule intended that their rule be available to cover not only conduct by a lawyer acting as such but also a lawyer's private conduct." (footnote omitted)); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974) (stating that the provisions of DR 1-102(A)(3) and (4) are not limited to a lawyer's conduct while he is acting in his professional capacity as a lawyer).

6 Rule 8.4(b) provides that "[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES OF PROF'L CONDUCT R. 8.4(b).

7 Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." *Id.* R. 8.4(d).

8 Model Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

misrepresentation is intended to be broad, so as to cover conduct that might otherwise slip through the cracks and not be banned by the more specific Model Rules prohibitions.[9] Thus, although Model Rule 3.3(a)(1) states that "A lawyer shall not knowingly: (1) make a false statement of material fact . . . to a tribunal," Model Rule 8.4(c) has on occasion been held to prohibit misrepresentations even as to immaterial facts.[10]

The unconditional nature of Rule 8.4(c)[11] becomes evident when one contrasts its language to that of Model Rule 1.6 that pertains to confidentiality.[12] Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for

---

Id. R. 4.1. Thus, Model Rule 4.1(a) seems only to proscribe misrepresentations and not to require any affirmative disclosures. Model Rule 4.1(b) does not require disclosures regarding the law and does not require factual disclosures which would violate Model Rule 1.6. By contrast, Model Rule 3.3 requires an attorney to act with "candor toward the tribunal," and, among other things, states that

> (a) A lawyer shall not knowingly:
>
> . . . .
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .

Id. R. 3.3(a). Thus, as to a tribunal there are more disclosure requirements, and these requirements are not subject to Rule 1.6.

9 One of the Center's publications states: "Even though many of the cases under Rule 8.4(c) involve conduct that would be proscribed under other Model Rules, this provision fills gaps that may exist between or among other Rules." AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 566 (Ctr. for Prof'l Responsibility 3d ed. 1996) (citations omitted). Thus, while Rule 3.3, dealing with an attorney's candor toward a tribunal, only forbids a lawyer from knowingly making a "false statement of *material* fact . . . to a tribunal," MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (emphasis added), Rule 8.4(c) applies even to misrepresentations about immaterial facts. *See, e.g., In re* Ver Dught, 825 S.W.2d 847, 850–51 (Mo. 1992) (en banc).

10 *But see In re* Hiller, 694 P.2d 540, 543 (Or. 1985) (en banc) (stating that a "misrepresentation" involved the knowing statement of a false statement of fact that was "material").

11 *See* Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 722 (1989) ("The American Bar Association's response to the complexities in the area of lying is the Model Code of Professional Responsibility, which lays down an unqualified standard prohibiting a lawyer from using any form of deception.").

12 Shine also contrasts the absolute language of Rule 8.4 with Rule 1.6, which sets forth exceptions. *See id.* at 739–40.

> disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[13]

Although Rule 1.6 specifies exceptions, Rule 8.4 contains none. Consequently, it seems that Rule 8.4 unconditionally forbids misrepresentations, even in the lawyer's non-professional life, and even when necessary "to prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[14]

Recently, a Colorado disciplinary board resoundingly declared that there are no exceptions to Rule 8.4's rule against misrepresentation.[15] The case involved conversations that Mark C. Pautler, a chief deputy district attorney in Jefferson County, Colorado, held with William "Cody" Neal.[16] Before Pautler spoke with Neal, Neal had confessed by phone to having brutally murdered three women.[17] In addition, a fourth woman had already contacted the Jefferson County

---

13 MODEL RULES OF PROF'L CONDUCT R. 1.6.

14 *Id.* R. 1.6(b)(1). Although some commentators suggest that Rule 8.4(c) need not be read as applying to misrepresentations in such cases, their arguments seem unpersuasive in the light of the various arguments developed in the text.

> Under rules of professional legal responsibility, lying is never justified. . . . Unlike the law enforcement justification, however, when it comes to the ethical rules and deception, courts do not make any distinction on the basis of whether an attorney was pursuing legitimate ends. The only consideration is whether the attorney intended to do an action prohibited by the letter of the ethical rule. Thus, if an attorney perpetrated a deception in an attempt to disclose bribery or to protect a witness from death, he would violate the Disciplinary Rules. Some disagree with this stance, but a majority of courts adhere to it.

Shine, *supra* note 11, at 739 (citations omitted).

15 People v. Pautler, No. OOPDJ016, 2001 WL 1162015 (Colo. Office of the Presiding Disciplinary Judge Apr. 2, 2001).

16 *Id.* at *3–*4.

17 *Id.* at *3.

Sheriff's Department and told it that Neal had tied her spread-eagled to eye bolts he had installed in the floor, forced her to watch the third of the three murders, placed a gun to her head, and raped her.[18] Several others whom Neal had held hostage had also already given statements to the Jefferson County Sheriff's Department.[19] In a phone conversation with Deputy Sheriff Cheryl Zimmerman, Neal had stated that he was armed and had "made statements which could be interpreted as threats to kill others."[20] In its opinion, the Disciplinary Hearing Board (Board) found, as a fact, that "[b]oth Deputy Sheriff Zimmerman and Pautler perceived that Neal posed a significant risk of harm to members of the public."[21]

Neal told Zimmerman that he was interested in surrendering to authorities but wanted first to speak to a lawyer named Daniel Plattner.[22] Although Pautler found Plattner's office number and called it, he was informed that the number was no longer in service.[23] After Neal was told by Zimmerman that Plattner's office number was not in service, Neal asked to speak to a public defender.[24] Pautler told Zimmerman that he would pose as a public defender, and Zimmerman introduced him to Neal as a public defender by the name of "Mark Palmer."[25] Pautler proceeded to conduct two phone conversations with Neal, pretending in each that he was a lawyer representing Neal and encouraging Neal to surrender to sheriff department officials.[26] The Board found that, when he engaged in this conduct, Pautler "considered the situation to be very dangerous, believed the public to be at risk and thought extraordinary measures were required."[27] Furthermore, it stated that Pautler "knew that his deceptive conduct would be criticized by some and probably questioned by those enforcing the rules of professional conduct for attorneys . . . . [H]e believed that the circumstances and attendant risk of Neal causing further harm to the public justified his conduct."[28]

The disciplinary complaint filed against Pautler charged him, in part, with violating Colorado's version of Model Rule 8.4(c),[29] which

18 *Id.* at *2.
19 *Id.*
20 *Id.* at *3.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* at *4.
26 *Id.*
27 *Id.* at *3.
28 *Id.* at *4.
29 *Id.* at *5.

is identical to the ABA Model Rule quoted above. Among other things, Pautler argued that "justification" should be a defense to the charges brought under this rule.[30] Nonetheless, using very broad language, the Board rejected the notion that there were any exceptions to the rule:

> No exception to the prohibition contained in Colo. RPC [i.e., Rules of Professional Conduct] 8.4(c) is found within the rules nor is any suggested within the explanatory commentary. After exhaustive research, not a single case has been discovered which recognizes an exception to the ethical principle that a lawyer may not engage in deceptive conduct. Neither the People nor Pautler has provided any such authority. . . .
>
> . . . .
>
> . . . If it is not yet clear, The Rules of Professional Conduct mandate that lawyers may not, can not and must not engage in conduct involving deceit. The ends do not justify the means. Justification does not present a defense to an alleged violation of Colo. RPC 8.4(c) or Colo. RPC 4.3.10.[31]

The Board could have limited its ruling in many possible ways. For example, while recognizing the possibility of a justification exception, it might have concluded that the public danger perceived by Pautler was insufficiently imminent or definite to justify the type of misrepresentation to which Pautler resorted. After all, the misrepresentation was made by a government attorney to a criminal suspect and involved an issue of fundamental importance, i.e., whether Pautler was serving as the suspect's personal attorney or whether he was the attorney for the suspect's adversary.

Nevertheless, even while acknowledging that "[t]he application of Colo. RPC 8.4(c) is broad and prohibits deceptive conduct by attorneys in both professional and nonprofessional situations,"[32] the Board did not restrict the scope of its declaration.

Thus, understood as the Board construed it, Model Rule 8.4(c) would apply as follows. Suppose a suicide bomber stops someone strolling in downtown Chicago and demands directions to the Sears Tower. If the person stopped were an attorney, she would violate Rule 8.4(c) if she lies to the terrorist and, instead, directs him to the nearest police station.[33]

---

30 *Id.*

31 *Id.* at *5, *8.

32 *Id.* at *9.

33 Of course, she would also violate the rule if she said, "I don't know," if, in fact, she did know.

Such an unconditional proscription of lying is not unheard of. For example, although Church Father Augustine (354–430), Bishop of Hippo, distinguishes between eight types of lies, he declares that it is always wrongful to lie,[34] not only if it would be necessary to save a person's temporal life, but even if it is necessary to save his eternal life.[35] Similarly, although Thomas Aquinas employs a different typology, categorizing lies as either officious (helpful), jocose (jesting),[36] or mischievous (malicious), he agreed with Augustine that all lies are sinful.[37]

Among secular philosophers, Immanuel Kant is perhaps the most well-known for embracing this approach, maintaining that it is a categorical imperative not to lie.[38] He posits a case, for instance, in which

---

34 SAINT AUGUSTINE, *Against Lying* (Harold B. Jaffee trans.) [hereinafter AUGUSTINE, *Against Lying*], *reprinted in* SAINT AUGUSTINE: TREATISES ON VARIOUS SUBJECTS 111, 174 (Roy J. Deferrari ed., Mary Sarah Muldowney et al. trans., Fathers of the Church, Inc. 1952) ("Therefore, it is not true that sometimes we ought to lie.").

35 *See, e.g.*, SAINT AUGUSTINE, *Lying* (Mary Sarah Muldowney trans.) [hereinafter AUGUSTINE, *Lying*], *reprinted in* SAINT AUGUSTINE: TREATIES ON VARIOUS SUBJECTS 45, 67 (Roy J. Deferrari ed., Mary Sarah Muldowney et al. trans., Fathers of the Church, Inc. 1952) ("Since, therefore, eternal life is lost by lying, a lie may never be told for the preservation of the temporal life of another."); *see also, e.g.*, AUGUSTINE, *Against Lying*, *supra* note 34, *reprinted in* SAINT AUGUSTINE: TREATISES ON VARIOUS SUBJECTS 111, 176 (Roy J. Deferrari ed., Mary Sarah Muldowney et al. trans., Fathers of the Church, Inc. 1952).

> Sometimes we are confronted also with danger to eternal welfare itself, which we are importunately told must be averted by our lying if it is not possible otherwise . . . . From this most invidious importunity whereby we are urged to lie not on behalf of anyone's transitory wealth or honor in this world, not on behalf of this life here below but on behalf of a man's eternal salvation—from this importunity where shall I take refuge, O Truth, except in Thee?

Id., *reprinted in* SAINT AUGUSTINE: TREATISES ON VARIOUS SUBJECTS 111, 176 (Roy J. Deferrari ed., Mary Sarah Muldowney et al. trans., Fathers of the Church, Inc. 1952).

36 Interestingly, in his work, *Lying*, in which he identifies eight kinds of lies, Augustine wrote:

> In this treatise I am excluding the question of jocose lies, which have never been considered as real lies, since both in the verbal expression and in the attitude of the one joking such lies are accompanied by a very evident lack of intention to deceive, even though the person be not speaking the truth.

AUGUSTINE, *Lying*, *supra* note 35, *reprinted in* SAINT AUGUSTINE: TREATISES ON VARIOUS SUBJECTS 45, 54 (Roy J. Deferrari ed., Mary Sarah Muldowney et al. trans., Fathers of the Church, Inc. 1952).

37 Aquinas, however, contended that only mischievous lies were "mortal sins." *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 34 (1999).

38 *See* IMMANUEL KANT, *On a Supposed Right To Lie from Altruistic Motvies, in* CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346, 350 (Lewis White Beck trans. & ed., 1949) (applying the categorical imperative by stating

a murderer comes to a house for the purpose of murdering a particular person.[39] The murderer asks if his prospective victim is within the house. Kant concludes that it would be morally wrong to lie to the murderer even if the lie would be believed and, as a consequence, the victim's life would be spared.[40]

Admittedly, our Sears Tower scenario is rarely, if ever, the subject of attorney disciplinary proceedings. Nor does it seem too likely that the potential of such prosecution would influence an attorney's conduct in that context. Nevertheless, the apparently unconditional nature of Rule 8.4(c) may well have a seriously deleterious effect in preventing government and private attorneys from protecting witnesses and others from retaliation[41] and from rooting out other significant crimes and social evils, from child abuse and drug trafficking to racial discrimination and consumer fraud.

Effective in 1999, the McDade Amendment[42] subjected all federal lawyers to state laws and state ethics rules governing attorney conduct. In a case last year, *In re Gatti*,[43] the Oregon Supreme Court carefully considered how its rule against dishonesty applied to such attorneys.[44] The United States Attorney for the District of Oregon asked the court to rule that "[g]overnment attorneys who advise, conduct or supervise legitimate law enforcement activities that involve some form of deception or covert operations do not violate DR 1-102(A)(3)."[45] Similarly, Oregon's Attorney General argued that the court should "not inter-

---

that "the duty of being truthful . . . is unconditional and the supreme juridical condition in testimony").

39 *See id.* at 347–48.

40 *See id.* at 348. Kant writes that "Truthfulness in statements which cannot be avoided is the formal duty of an individual to everyone, however great may be the disadvantage accruing to himself or to another." *Id.* at 347 (footnote omitted).

41 Brian Malone, the Inspector General of the New York State Department of Correctional Services, for instance, wanted to protect a witness, a correctional facilities guard, from retaliation by other guards for breaking the "code of silence" and testifying about an allegedly unprovoked attack by the other guards against an inmate. To protect the identity of the witness, he instructed the witness to lie under oath when he was deposed in the presence of the other guards. The court found that by giving such advice, Malone violated DR 1-102[A][4]: "A lawyer shall not: . . . Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *In re* Malone, 480 N.Y.S.2d 603, 607 (App. Div. 1984).

42 The McDade Amendment, named for Joseph M. McDade, its principal sponsor in the U.S. House of Representatives, is also known as the Ethical Standards for Federal Prosecutors Act and the Citizen's Protection Act and is codified at 28 U.S.C. § 530B (2001).

43 8 P.3d 966 (Or. 2000) (en banc).

44 *Id.* at 974–76.

45 *Id.* at 975.

pret DR 1-102(A)(3) in a manner that would determine that government attorneys who advise, conduct or supervise legitimate law enforcement activities that involve covert operations violate that disciplinary rule."[46]

The Oregon Consumer League, the Fair Housing Counsel of Oregon, the Oregon Law Center, and others, appearing as amici curiae, argued that non-governmental attorneys should also be entitled to use deception in their investigative efforts.[47]

The Oregon Supreme Court acknowledged that

> [a]s members of the Bar ourselves—some of whom have prior experience as government lawyers and some of whom have prior experience in private practice—this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics.[48]

Nevertheless, the Court declared,

> ORS 9.490(1) provides that the rules of professional conduct "shall be binding upon *all* members of the bar." Faithful adherence to the wording of DR 1-102(A)(3), DR 7-102(A)(5), ORS 9.527(4), and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements.[49]

How has this ruling affected government prosecutorial activities in Oregon? It has been reported that "numerous undercover investigations in Oregon 'have ground to a halt,' with the result that individuals and groups involved in illegal activity have been allowed to remain at large."[50] The Department of Justice has sued the Oregon State Bar in federal court, seeking to preclude it from enforcing the

---

46 *Id.*

47 *Id.* These amici supported adoption of the following rule:

> Provided that the conduct does not violate any other provision of law or Disciplinary Rule, and notwithstanding DR 1-102, DR 7-102 and ORS [9.527(4)], a lawyer, personally or through an employee or agent, may misstate or fail to state his or her identity and/or purpose in contacting someone who is the subject of an investigation for the purpose of gathering facts before filing suit.

Id.

48 *Id.* at 976.

49 *Id.* (emphasis in original).

50 Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707, 717 (2001) (quoting United States v. Ore. State Bar, Civ. No. 01-6168-HO, ¶ 28 (D. Or. 2001)).

dishonesty rule against federal attorneys admitted in Oregon for lawful activities relating to their official duties.[51] In its papers, the Department of Justice states,

> The United States Attorney's Office ("USAO") has ceased giving advice and direction with respect to undercover investigations so as to avoid running afoul of the Oregon rules as interpreted in *Gatti*.... [T]he FBI has been forced to suspend a child pornography investigation developed by undercover agents, and has been precluded from utilizing cooperating witnesses to pursue at least two major drug investigations, three extortion cases, and a major white collar crime investigation .... DEA investigations of major drug trafficking organizations have been hampered and delayed and have not resulted in prosecutions, even though several major cases deserving prosecution have arisen. The DEA has also been barred from conducting electronic surveillance on important targets in two separate cases originating in other districts but involving illegal drug activities in Oregon.[52]

Jesselyn Radack, an attorney for the federal government, argues,

> The chilling effect reaches beyond just these cases. Civil matters are being affected, too. For example, without risking disciplinary sanctions, the United States Attorney's Office cannot oversee or provide advice regarding the "testing" of discriminatory housing or banking practices in Oregon, even though such testing may be initiated in response to a valid complaint, and even though the Supreme Court has approved of testing as an effective means of discovering discrimination. Moreover, the Office is largely prevented from prosecuting *qui tam* actions pursuant to the "whistleblower" provisions of the *False Claims Act.* Such actions comprise a major portion of the Office's health care fraud cases and all of its defense procurement fraud cases. Nevertheless, since these actions are frequently initiated by whistleblowers who covertly gather information about government contractors suspected of fraud, they may involve deceptive conduct prohibited by Oregon's ethics rules.[53]

B. Problems with America's Categorical Imperative Approach

As will be explained in Part II, Jewish law unequivocally rejects any categorical prohibition against lying by lawyers. Nevertheless, before exploring the comparative merits of Jewish law's perspective, it

---

51 *Id.* at 718.

52 *Id.* at 717 (quoting United States v. Ore. State Bar, Civ. No. 01-6168-HO, ¶ 26 (D. Or. 2001)).

53 *Id.* at 717–18 (citations omitted).

is useful to raise a few direct concerns regarding the appropriateness of the American approach.

First, assuming that a categorical imperative approach proscribing particular acts would otherwise be appropriate, it is not clear why the American system has made the choice to single out misrepresentation for unconditional condemnation. Consider, again, the differences between Rules 8.4(c) and 1.6. Rule 8.4(c) forbids even misrepresentations that are unrelated to an attorney-client relationship and unrelated to the practice of law. By contrast, Rule 1.6, at least in certain cases, permits an attorney to "betray" a confidence with which a client, a person with whom she has established a serious bond and to whom the secular system recognizes she owes significant fiduciary duties, has entrusted her. I suspect that many, if not most, people would think that revealing a client's secrets would be at least as morally questionable an act—and perhaps even more so—than resorting to a misrepresentation to a non-client.

Moreover, another exception in Rule 1.6 allows an attorney to reveal confidences in order to establish a claim against the client, including a claim for payment for the attorney's legal services. Rule 8.4 does not provide a similar exception as to misrepresentations. Why is this justification apparently persuasive—to the rulemakers at least—to permit betraying a client's trust but not to engaging in a misrepresentation?

As applied to state ethics codes, this question can be put even more emphatically. Not only do many state versions of Rule 1.6 actually require disclosure in some cases, they often contain more exceptions as to when disclosure of otherwise confidential information is permitted.[54] Nevertheless, their versions of Rule 8.4(c) typically contain no exceptions.

In certain cases, secular criminal law allows a person, even if she is an attorney, to use deadly force to protect the lives of others.[55] Yet, Rule 8.4(c) would apparently not allow an attorney to lie to protect

54 *See* MORGAN & ROTUNDA, *supra* note 2, at 134–51.

55 Sometimes resort to such force is statutorily authorized. *See, e.g.*, CAL. PENAL CODE § 198.5 (West 1999); COLO. REV. STAT. ANN. § 18-1-704.5(2)–(3) (West 1999); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 1993); MASS. ANN. LAWS ch. 278, § 8A (Law. Co-op. 1992); N.J. STAT. ANN. §§ 2C:3-4, 6 (West 1995 & Supp. 2001); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2001); People v. Kucala, 288 N.E.2d 622, 626 (Ill. App. Ct. 1972). *See generally* Danny R. Veilleux, Annotation, *Construction and Application of Statutes Justifying the Use of Force To Prevent the Use of Force Against Another*, 71 A.L.R. 4TH 940 (1989) (providing an overview of statutory and case law in this area). On other occasions, it may be permitted as a matter of common law. *See, e.g.*, Fersner v. United States, 482 A.2d 387, 391–92 (D.C. 1984); Duckett v. State, 966 P.2d 941, 944–46 (Wyo. 1998).

such lives. Returning to our Sears Tower example, although it would violate Rule 8.4 for the attorney to lie to the bomber about the location of the Sears Tower, once the bomber walks off, the attorney, in certain cases at least, might be permitted to pick up a gun and, if he refuses to halt and disarm, to shoot him without violating either the law or the ethics rules. Does this make sense?[56] Why, then, do we have this special, unconditional proscription with respect to dishonesty?

Second, how does the categorical proscription of dishonesty promote legitimate goals of the justice system? The justification for Rule 8.4 is presumably predicated upon the fact that the rule applies specifically to lawyers and that the principle purposes of disciplinary proceedings are "to protect society and maintain the integrity of the legal profession."[57]

But while it is true that each instance involving possible deception to promote a just result invites a complex calculus of immediate, intermediate, and long run consequences, it is unclear why one should assume that such deception, on balance, represents a danger to society. Indeed, in Part II, below, discusses numerous societal benefits flow from well-intended deception.

Nor is it at all clear that all deceptions to promote justice would necessarily endanger the integrity of, or public confidence in, the legal system. In fact, at least part of the negative image regarding lawyers seems to be the notion that they do not strive to accomplish justice but, rather, to advance blindly their clients' selfish interests, irrespective of the moral merit of such interests.[58] The fact that lawyers might dissemble—at least under certain circumstances—for the

56 *See, e.g.*, Shine, *supra* note 11, at 723 n.12 (citing H. SIDGWICK, THE METHODS OF ETHICS 315 (7th ed. 1981) ("[S]o if we may even kill in defence of ourselves and others, it seems strange if we may not lie, if lying will defend us better . . . .") and others).

57 *In re* Ver Dught, 825 S.W.2d 847, 851 (Mo. 1992) (en banc) (citation omitted). Interestingly, Mr. Shine cites *In re Malone*, 480 N.Y.S.2d 603, 607 (App. Div. 1984), for the proposition that disciplinary sanction is "to protect the public, *to deter similar conduct*, and to preserve the reputation of the bar." Shine, *supra* note 11, at 749 (emphasis added), and therefore states that "[w]hen a deception by a lawyer does not injure the public interest or the reputation of the bar, *and does not encourage similar action in the future*, not only should there be no sanction, but there should be no violation." *Id.* (emphasis added). If, however, an action injures neither the public interest nor the reputation of the bar, the action should not be sanctionable even if it does encourage future conduct that also injures neither the public interest nor the reputation of the bar.

58 *See, e.g.*, Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1421 (1999).

purpose of achieving justice (especially when the stakes are high) might refreshingly refurbish the public image of lawyers. Indeed, in light of empirical evidence regarding the public image of lawyers, it seems unlikely that the longstanding categorical rule against attorney misrepresentation has really helped much.[59]

Third, the categorical ban on dishonesty seems strikingly hypocritical. Despite this ban, American legal ethics, without much justification at all, permits many practices that are inherently misleading and deceitful even though they are deemed not to involve *technical* misrepresentations. Consider, for instance, the following scenario.[60]

---

59 Consider, for instance, the following:

> Data from national public-opinion polls over the past few decades confirm the conventional wisdom that respect for the legal profession has declined over the past twenty years. Indeed, when comparing ratings for occupational prestige, honesty and ethical standards, and role model suitability, the data reveal a clear and consistent pattern: Americans no longer respect the legal profession . . . .
>
> First, consider ratings of occupational prestige. Polls conducted by Louis Harris and Associates, for example, reveal a decline in public perception of the prestige of the legal profession. For decades, pollsters at the Harris organization have asked random samples of adult Americans to rate the prestige of a variety of occupations . . . . In 1977, almost 75 percent of respondents believed the legal profession had either very great or considerable prestige . . . . Twenty years later, public opinion has changed dramatically. A near majority (47 percent) of respondents to the same question in an April 1997 survey ranked the legal profession as having either some or hardly any prestige at all.
>
> . . . .
>
> Other national surveys confirm this trend. According to Gallup polls, majorities of Americans consistently give pharmacists, members of the clergy, dentists, and doctors high ratings for honesty and ethics, yet no more than 27 percent of Americans surveyed since 1976 rate lawyers as highly ethical . . . . Although a quarter of respondents in Gallup polls between 1976 and 1985 gave lawyers favorable ratings, only 16 percent of respondents to a 1995 Gallup national survey believe the honesty and ethical standards of lawyers are "very high" or "high."
>
> . . . .
>
> Generally speaking, however, belief in the honesty of lawyers is inversely proportional to years of education. Whereas only 11 percent of college-educated respondents gave lawyers high or very high ethical ratings, 30 percent of respondents with less than a high-school education ranked lawyers highly.

Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 850, 851, 854 (1998) (citations omitted).

60 I am not attempting to equate deceptions conducted out of court with those perpetrated in court. In fact, as I hope to explore in a separate article, even some Jewish law authorities believe that a more stringent rule ought to apply to in court

You are defense counsel, and your client is accused of rape. The defendant tells you that he is guilty of the rape. He even tells you factual details that corroborate his confession and that only the real rapist should know. You believe beyond a reasonable doubt that he is in fact guilty of the rape. However, you think that you might be able to successfully convince the jury of a story you factually believe to be false; namely, that the rape victim was really a prostitute who filed a complaint against the defendant because he failed to pay her all of the money that she demanded. Suppose, further, that in order to succeed, you will have to subject the innocent rape victim to a withering cross-examination that will undoubtedly cause her to experience substantial emotional distress. Nevertheless, for a variety of reasons, you believe that this tactic is likely to work.

Not only could such cross-examination mislead the trier of fact to reach the wrong conclusion, causing a miscarriage of justice, but it could also inflict excruciating emotional wounds on the witness, whose perception of the lawyer—and, possibly, of the legal system—may be permanently impaired. Consider, for instance, how Seymour Wishman, an experienced criminal trial attorney, describes a fortuitous out-of-court encounter with a woman whom he had zealously cross-examined:

> My client's sister and I joined the parade of wounded and mutilated bodies staggering through the swinging doors. Across the lobby, a heavy but not unattractive woman in a nurse's uniform suddenly shrieked, "Get that motherfucker out of here!" Two woman rushed forward to restrain her. "That's the lawyer, that's the motherfuckin' lawyer!" she shouted.
>
> I looked around me. No one else resembled a lawyer. Still screaming she dragged her two restrainers toward me. I was baffled. As the only white face in a crowd of forty, I felt a growing sense of anxiety.
>
> "That's the son of a bitch that did it to me!" she screamed.
>
> I didn't know what she was talking about.
>
> "Kill him and that Nigger Horton!"
>
> Larry Horton . . . of course. Larry Horton was a client of mine. Six months before, I had represented him at his trial for sodomy and rape. At last I recognized the woman's face. She had testified as the "complaining" witness against Horton.

---

misrepresentations. The point made in the text, however, is that the secular leniencies as to in-court deception seem incongruous to a categorical ban on out-of-court misrepresentations.

WISHMAN: Isn't it a fact that after you met the defendant at a bar, you asked if he wanted to have a good time?

LEWIS: No! That's a lie!

WISHMAN: Isn't it true that you took him and his three friends back to your apartment and had that good time?

LEWIS: No!

WISHMAN: And, after you had that good time, didn't you ask for money?

LEWIS: No such way!

WISHMAN: Isn't it a fact that the only reason you made a complaint was because you were furious for not getting paid?

LEWIS: No! No! That's a lie!

WISHMAN: You claim to have been raped and sodomized. As a nurse, you surely have and idea of the effect of such an assault on a woman's body. Are you aware, Mrs. Lewis, that the police doctor found no evidence of force or trauma?

LEWIS: I don't know what the doctors found . . . .

. . .

Weighing on me more heavily than the possibility that I had helped a guilty man escape punishment was the undeniable fact that I had humiliated the victim—alleged victim—in my cross-examination of her. But, as all criminal lawyers know, to be effective in court I had to act forcefully, even brutally, at times. I had been trained in law school to regard the "cross" as an art form. In the course of my career I had frequently discredited witnesses. My defense of myself had always been that there was nothing personal in what I was doing. This woman was obviously unwilling to dismiss my behavior as merely an aspect of my professional responsibility; instead of an effective counsel, she saw me simply as a "motherfucker."[61]

Assume that an attorney acted as Wishman did despite his belief beyond a reasonable doubt in his client's guilt. If so, his concept of being an effective attorney not only involved wrongfully accusing an innocent victim of being a prostitute, but, presumably, of adultery. This accusation may well have been in the presence of her husband, family, and friends, who may have been present in court to provide her with emotional support. Why do I use the word *accusations* even though the attorney only asked *questions*? Because I believe that a listener—at least a listener who is not trained as an attorney—hears

61 SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 3–7 (1981), *reprinted in* ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION 166–67 (1996).

Wishman's questions as factual accusations.[62] Indeed, the attorney probably hopes they are understood as such.

Moreover, the attorney's summation would undoubtedly appear to all present as an indictment against the victim. Indeed, one can almost hear him conclude, "Based on all of the evidence in the record, including Mrs. Lewis's demeanor and her inability to explain the absence of any physical evidence of force or trauma, I submit that Mrs. Lewis not only had sex with the defendant voluntarily but that it was her idea." Although use of the phrase "I submit" would technically prevent the attorney from being sanctioned for improperly expressing his personal opinion,[63] I doubt that many listeners would be sensitive to such a nuance.

I believe that most attorneys would construe the ethics rules in virtually all jurisdictions as allowing—and a significant number of attorneys would construe them as requiring—the attorney to proceed as Wishman did. Indeed, in the past, rape victims were often pilloried by defense counsel who investigated their past sexual histories in intimate detail and with the victim under oath on the witness stand, in open court, in order to discredit the witness. While such practices were permitted, attorneys might worry that their refusal to utilize them on moral ground might expose them to disciplinary sanction or civil liability to their clients.[64] I believe that these rules cast shame on lawyers, while misrepresentations to achieve substantial justice can actually honor the profession.

Similarly, American attorneys generally coach their witnesses as to the substance and style of their testimony. According to some com-

62 As a friend of mine, Rabbi Aaron Small, put it, even though *Jeopardy* answers are put in the form of questions, everyone understands them for what they are, namely, answers.

63 *See, e.g.*, United States v. Stulga, 584 F.2d 142, 147 (6th Cir. 1978); Goutis v. Express Trans., Inc., 699 So. 2d 757, 764 (Fla. Dist. Ct. App. 1997); People v. Sheridan, 373 N.E.2d 669, 674 (Ill. App. Ct. 1978); State v. Lane, 458 S.E.2d 19, 23 (N.C. Ct. App. 1995); Hill v. State, 560 P.2d 213, 215–16 (Okla. Crim. App. 1977); State v. Asbury, 415 S.E.2d 891, 895–96 (W. Va. 1992). *See generally* 75A AM. JUR. 2D *Trial* §§ 566, 635, 699 (1991) (discussing the propriety of certain arguments and comments as well as what constitutes an objectionable reference to the guilt of the accused); FLORIDA CIVIL TRIAL PRACTICE, CIVTP FL-CLE 16-1 (1998) (discussing the legal principles of summation).

64 *See, e.g.*, Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" To Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 135 (1987). As to the present state of the law, see generally Kristine Cordier Karnezis, Annotation, *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's General Reputation for Unchastity*, 95 A.L.R. 3D 1181, 1193–94 (1979) (discussing cases that viewed evidence of complainant's credibility as admissible).

mentators at least, lawyers may even be permitted to instruct their witnesses as to how to answer questions evasively so as to avoid disclosing the truth.[65] Such practices, when employed to mislead factfinders into relying on stories the attorney believes, beyond a reasonable doubt, are false seem intrinsically deceitful. These practices would seem to cast more doubt on the integrity of the profession than various types of technical misrepresentations designed to promote the truth.

Another practice is "contrived ignorance," whereby the attorney purposely avoids finding out the facts from the client.[66] Instead, the lawyer explains to the client the facts—including the client's subjective state of mind at the relevant time or times—on which the which the client may win and the facts on which the client will probably lose. Only thereafter does the lawyer discuss the client's anticipated testimony, if any. In this way, the client is in a position to perjure himself—especially as to his state of mind—without the attorney bearing the ethical responsibilities attendant to an attorney who "knows" that his client's testimony, or intended testimony, constitutes perjury.

Practical constraints prevent us from examining all types of arguably deceptive, yet arguably permissible, attorney conduct. Nevertheless, one last example is too prevalent to pretermit. It concerns misrepresentations involving the negotiation process. Rule 4.1 states that, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."[67] Nevertheless, ABA comment 2 to this Rule "explains":

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category . . . .[68]

What, exactly, does this comment mean? Estimates of price or value and a party's intentions as to an acceptable settlement of a claim are obviously relevant and important. In this sense, therefore, they are surely "material." Consequently, why should statements regarding

65 *See* Note, *Ethical Abuse of Technicalities: A Comparison of Prospective and Retrospective Legal Ethics*, 112 HARV. L. REV. 1082, 1092 (1999) (discussing how ethical obligations are no different when a lawyer is advising a client regarding prospective conduct as opposed to defending the conduct after the fact).

66 *See* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 958 (1999).

67 MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983).

68 *Id.* R. 4.1 cmt. 2.

these issues not be regarded as statements of "material fact"? Indeed, even if the statements are not "material," if they are misrepresentations, why should not uttering them violate Rule 8.4(c)? Perhaps the real point of the comment is that, because people know that lawyers lie about such issues, such statements are not considered to be "factual" statements. But is not an important reason why lawyers lie about these things the fact that they expect (and hope) that—at least sometimes—their lies will be believed as facts? If so, why should the ethics rules allow such lying? And, after allowing this type of disingenuous lying whether or not it is related to promoting justice, why do the rules adopt a categorical prohibition against other misrepresentations?

C. The Role-Differentiated Response

Many difficult legal ethics rules are based on the special role that secular lawyers have as their clients' advocates in an adversary process.[69] As Professor Leonard Gross puts it:

> Much of the public misunderstands the role of lawyers in the adversary system. Many people apparently believe that lawyers should be engaged in a search for truth. They misunderstand lawyers' primary task, which is to represent effectively their clients and to advance their clients' rights. Consequently, they believe that lawyers are engaged in some sort of deceitful or unethical practice when, in reality, lawyers are merely fulfilling their role in the adversary system.[70]

But a role-based justification begs the basic question: what is the underlying ethical justification for an adversarial system that calls for such questionable kinds of conduct? Contemporary thinkers look back upon trial by combat as an essentially barbaric and ineffective way of establishing the truth. Future thinkers may feel the same way about the twentieth-century's "adversary" system, where the parties' respective champions use innuendo, merciless cross-examination, and chicanery as their weapons of choice.

If the adversary system in fact promoted the search for truth, then, perhaps, it would make sense. But as Professor David Luban points out: "[I]t is unsurprising to discover that the arguments purporting to show the advantages of the adversary system as a fact-finder have mostly been nonempirical, a mix of a priori theories of inquiry and armchair psychology."[71]

---

69 *See, e.g.*, Gross, *supra* note 58.

70 *Id.* at 1421 (footnotes omitted).

71 DAVID LUBAN, *The Adversary System Excuse*, *in* DAVID LUBAN, THE ETHICS OF LAWYERS 149–50 (1994).

For example, what are the benefits to the justice system of having an attorney advocate what she knows to be a factually untrue story on behalf of a client the attorney knows is guilty? As Professors Roy Simon and Murray Schwartz put the question:

> [H]ow can advocacy of something that the lawyer knows is untruthful serve the ends of truth? How can a lawyer claim to be helping the search for truth by making a guilty client appear not guilty . . . or by making an unlikely story seem true? If the version of the facts being argued by the defense is not true, how can that foster truth?[72]

The notion that the special "role" a person may play may affect his ethical obligations is not necessarily a difficult one to understand. A teacher, for example, may have a special duty to help develop a student's intellectual powers, a duty that many others may not have.[73] This is an example of "weak role differentiation," where the nature of the role only imposes an extra responsibility and, therefore, seems to pose no moral dilemma.[74] The secular legal system's adversarial model, however, is an example of "strong role differentiation," which purports to *increase* ethical accountability to some persons while *decreasing* ethical accountability to others.[75] Accordingly, Rule 8.4(c) could be characterized as an example of strong role differentiation in that it *decreases* an attorney's ethical responsibility, for instance, to the person whose life (or money) he might otherwise be ethically obligated to rescue by engaging in misrepresentation to a wrongdoer.[76] Similarly, secular ethics rules permitting some of the other tactics, discussed above, even though they are deceptive (and, in some instances, abusive as well) would also be examples of strong role differentiation.

II. JEWISH LAW'S CONTEXTUALIZED APPROACH

Jewish law assumes the existence of an omnipotent, omniscient, and benevolent Creator, whose purposes cannot always be fathomed, and of a network of metaphysical relationships between and among the Creator and all human beings. One of the overarching principles that provides guidance for Jews is the commandment that they be

72 *See* ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS 153 (3d ed. 1994).

73 *See* DAVID LUBAN, THE ETHICS OF LAWYERS, at xiii (1994) (citing ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980)).

74 *See id.*

75 *See id.*

76 *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1983).

holy.[77] Being holy requires, among other things, fulfillment of a variety of ethical responsibilities owed to other human beings.

While Jewish law certainly allows a person to assume greater ethical duties towards others than they might otherwise have, Jewish law does not permit a person to shirk or dilute ethical duties by voluntarily joining a profession whose purported code of ethics prescribes strong role differentiation. Thus, Jewish law would generally disagree with any secular ethics rule—or fiduciary duty—that would warrant a professional acting less ethically to someone—such as a non-client—than a non-professional.

Jewish law importantly recognizes and underscores the ethical importance of truthfulness. Nevertheless, other values and principles are important as well. Consequently, according to Jewish law, whether a person should or should not engage in deceit in a particular case depends on the relative priorities of the interests at stake.

A. The Importance of Truthfulness

Jewish law cherishes truthfulness as an extremely important value. Although man's superlative attributes are ascribed to G-d,[78] He is said to have created the world through the attribute of truth.[79] The *Mishnah*[80] reports in the name of Rabbi Shimon ben Gamliel that truth is one of the three pillars, along with justice and peace, that continue to support the world.[81] The Talmud[82] announces that truth is G-d's sig-

---

77 *Leviticus* 19:2.

78 *See* R. AVRAHAM CHAIM FEUER, TASHLICH AND THE THIRTEEN ATTRIBUTES (1979); ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 7–20 (1979); *G-d*, *in* 7 ENCYCLOPAEDIA JUDAICA 651 (1971).

79 *See, e.g.*, ABRAHAM BEN ELIEZER HA-LEVI BERUKHIM (c. 1515–1593) (compiler), TIKUNEI ZOHAR, *Tikun* 63 (Hebrew); AVRAHAM TUVULSKI (contemporary), MEDEVVAR SHEKKER TIRKHAK 13 (citing Israel Meir ha-Kohen (*Hafetz Hayyim*, 1853–1933)). This is supposedly hinted at by the fact that the final letters of the first three words and the final letters of the last three words of the Biblical description of creation each spell the Hebrew word for "truth." *Id.* at 10 (citing YISROEL BEN YOSEF AL-NAKAWA (d. 1391), MENORAT HA-MA'OR, *perek* 35) (Hebrew).

80 The *Mishnah* was compiled approximately in the year 188 of the common era (year 3948 according to the Jewish calendar). *See generally Mishnah*, *in* 12 ENCYCLOPAEDIA JUDAICA, *supra* note 78, at 94–107. The Babylonian and Jerusalem Talmuds are organized in accordance with the format of the *Mishnah*.

81 MISHNAH, *Avot* 1:1 ("Rabban Shimon ben Gamliel says: 'The world stands on three things: on truth, on justice, and on peace . . . .'"); *see also* BABYLONIAN TALMUD, *Shabbat* 104a (contending that the fact the world is supported by truth and destroyed by falsehood is hinted at by the form of the Hebrew letters making up the words for truth and falsehood); *cf.* R. SHIMON BEN TZEMAH DURAN (*Rashbatz*, 1361–1444), MAGEN AVOT (Hebrew), *Pirkei Avot* 1:18 (citing other hints of the positive traits of

nature.[83] Subsequent authorities, citing Scriptural sources, declare that G-d is called "Truth," that the throne upon which He sits is Truth, that all of His words are truth, that all of His judgments are truth, etc.[84]

Judaism demands Jews to emulate G-d. Indeed, Maimonides includes this as one of the 613 fundamental biblical commandments:[85]

> He commanded us to emulate Him as much as we can, as the verse says, "And you shall walk in His ways." And this commandment is repeated and we are told "to walk in all of His ways." And it is explained:
>
> > Just as the Holy One, Blessed be He, is called gracious, you, too, should be gracious. Just as the Holy One, Blessed be He, is called merciful, you, too, should be merciful. Just as the Holy One, Blessed be He, is called righteous, you, too, should be righteous.[86]
>
> This obligation is repeated in other words when it says, "After Ha-Shem shall you walk", and it is explained that the message is that we should emulate Him as to His worthy actions and His honorable attributes by which He is described . . . .[87]

Consequently, just as G-d is truthful, Jews are required to be truthful.[88]

The ancient work, the *Hinnukh,* makes this point explicitly, stating:

> Lying is abominable and disgusting in the eyes of everyone; nothing is more repulsive. Malediction and cursedness is in the homes of all who love it, because G-d, blessed be He, is a G-d of truth and everything that is near Him is truth, and blessing is not found and does

---

truth and the negative nuances of falsehood from various aspects of the relevant Hebrew letters, including the numbers that such letters represent).

82 *See generally Babylonian Talmud, in* 15 ENCYCLOPAEDIA JUDAICA, *supra* note 76, at 755–67.

83 *See* BABYLONIAN TALMUD, *Shabbat* 55a.

84 *See* OHTIOT DE-RABBI AKIVA 1 (Hebrew), *cited in* TUVULSKI, *supra* note 79, at 11.

85 Rabbinic tradition reports that there are 613 biblical commandments. Jewish authorities disagree, however, as to precisely which rules are counted as part of this group of 613. *See generally The 613 Commandments, in* 5 ENCYCLOPAEDIA JUDAICA, *supra* note 76, at 759–83.

86 Although MOSHE BEN MAIMON (*Maimonides,* 1135–1204), SEFER HA-MITZVOT (Hebrew), contains a parenthetical suggesting that this language is from BABYLONIAN TALMUD, *Soteh* 14, that text does not use these words. Instead, it seems that the correct cite is to SIFREI, *Devarim* 10:12. For a general description of the Sifrei, see ENCYCLOPEDIA JUDAICA, *Sifrei* (CD-Rom, version 1.0, 1997).

87 MAIMONIDES, *supra* note 86, *Mitzvat Aseh* 8 (internal citations omitted).

88 MEIR MEISELES, JUDAISM: THOUGHT AND LEGEND 89 (1977).

not fall upon anyone other than those who emulate Him by their actions.[89]

The Torah also explicitly directs a person to stay afar from falsehood when it states *Medevvar Shekker Tirhakh.*[90] What does it mean to come too close to a falsehood? Rabbi Moshe Sofer (1762–1839), a leading Torah authority of the eighteenth century, gives an example. If the Torah had merely forbidden falsehoods, then someone who caused another to utter a lie, but did not lie himself, would not violate the rule. Because the Torah requires one to keep distant from falsehoods, someone who merely causes another to lie breaches the rule.[91] Although some authorities suggest that the applicable biblical verse applies only to judges conducting litigation,[92] others characterize it as giving rise to a far more sweeping biblical ban against prevarication.[93] Even many of those who think this particular verse is directed to judges believe that there is a broad, independent biblical or rabbinic prohibition against lying generally.

Depending on circumstances, those who lie may also transgress additional Jewish law prohibitions. Deceiving someone, for instance, violates the law against "stealing a person's consciousness" (*"Geneivat Da'at"*).[94] This is considered even more blameworthy than stealing someone's possessions[95] because the injury to the victim is more per-

89 Authorship of this work has historically been attributed to AHARON BEN YOSEF HA-LEVI (*ha-Hinnukh,* 1235–1300), SEFER HA-HINNUKH (Hebrew), *Mitzvah* 74, although scholars debate whether this attribution is correct.

90 *See Exodus* 23:7. This verse not only proscribes lying, but it requires that a person *distance* himself from falsehood. The commentators point out that there are only two places where the Torah does not merely prohibit a particular act or substance, but explicitly erects a "protective fence" around the proscription. This verse is one of those places because a person who comes too close to a falsehood violates a biblical prohibition even if he does not utter a falsehood. The other case involves the rule against eating leavened food (*Hametz*). Although the principal prohibition is against eating *Hametz* during Passover, the Torah also forbade the eating of *Hametz* during part of the day immediately preceding Passover.

91 *See* MOSHE SOFER, RESPONSA HATAM SOFER III, *Even ha-Ezer* (Hebrew), no. 20.

92 *See, e.g.,* HAYYIM BEN ISAAC VOLOZHINER (1749–1821), HUT HAMESHULASH I:16 (Hebrew).

93 *See, e.g.,* HIZKIAH DASILVA (1659–1695), PRI HADASH (Hebrew), *Orah Hayyim* 496:16; SEFER MITZVOT GADOL, *Mitzvat Aseh* 107 (Hebrew); HA-LEVI, *supra* note 89, *Mitzvah* 74; MAIMONIDES, *supra* note 86, *Mitzvat Aseh* 281; ELIEZER WALDENBERG (b. 1917), TZITZ ELIEZER XV:12 (Hebrew); MOSHE FEINSTEIN (1895–1986), IGGEROT MOSHE, *Orah Hayyim* II:51 (Hebrew).

94 *See* BABYLONIAN TALMUD, *Hullin 94a;* MAIMONIDES, MISHNEH TORAH, (Hebrew) *Hilkhot De'ot* 2:6.

95 According to many authorities, this prohibition against deception is biblical, derived from the verse "Thou shalt not steal" *Leviticus* 19:12, and may apply even in

sonal and direct. Of course, if the fraud wrongfully induces the victim to part with property, the deceiver is deemed to have stolen the property as well.[96] Similarly, a person who lies when testifying before a rabbinic court flouts the biblical injunction not to bear false witness,[97] and a person who lies when taking an oath violates the prohibition against taking G-d's name in vain.[98]

Countless statements throughout Jewish literature underscore the critical importance of truthfulness, the rewards for those who are truthful and the punishment of those who are not.[99] Thus, a person who is truthful receives special providential protection,[100] is rescued from adversities,[101] avoids sin,[102] enjoys success[103] and long life,[104] and ushers in the ultimate redemption of the Jewish people.[105] On the other hand, it is said that G-d "hates" someone who thinks one thing, but says another,[106] that such a person is like one who commits idolatry,[107] and that a liar is like one who is dead.[108]

B. Rejection of Any Categorical Imperative

Jewish law, however, also recognizes many other critically important values, such as the prevention, amelioration, or elimination of suffering and injustice, the promotion of peace, justice, and personal

---

some situations in which the theft of money is not necessarily biblically forbidden. *See* ENCYCLOPAEDIA TALMUDIT 6:225–6.

96 *See* MOSHE FEINSTEIN, IGGEROT MOSHE (Hebrew), *Hoshen Mishpat* II:30; MENASHE KLEIN, MISHNE HALACHOT (Hebrew) VII:275.

97 *See* HA-LEVI, *supra* note 89, *Mitzvah* 74.

98 *See Deuteronomy* 5:11; *Exodus* 20:7; *Leviticus* 5:4.

99 For collections of such statements, see for example TUVULSKI, *supra* note 79; YAAKOV FISH (contemporary), TITEIN EMET LE-YAAKOV (3d ed.) (Hebrew).

100 MOSHE BEN YAAKOV CORDOVERO, TOMER DEVORAH, *cited in* TUVULSKI, *supra* note 79, at 13.

101 *See, e.g.*, TUVULSKI, supra note 79, at 12 (citing ELIJAH BEN MOSES DE VIDAS (sixteenth century), REISHIT HOKHMAH, *Kedusha, perek* 12) (Hebrew); YEHIEL BEN YEKUTIEL BEN BENYAMIN HA-ROFE NAV (second half of the thirteenth century), MA'ALOT HA-MIDDOT (Hebrew), *Perek Timmemot.*

102 YEHUDA BEN SHMUEL HE-HASID (1150–1217), SEFER HASIDIM (Hebrew) 648.

103 MENORAT HA-MA'OR, *supra* note 79, *perek* 37.

104 MOSHE BEN YAAKOV CORDOVERO (1522–1570), TOMER DEVORAH, *cited in* TUVULSKI, *supra* note 79.

105 NAHMAN OF BRATSLAV, SEFER HA-MIDDOT, *cited in* TUVULSKI, *supra* note 79, at 15.

106 BABYLONIAN TALMUD, *Pesahim* 113b.

107 BABYLONIAN TALMUD, *Sanhedrin* 92a.

108 *See, e.g.*, FISH, *supra* note 99, at 6 (quoting R. MENAHEM BEN SHLOMO MEIRI, SEFER HA-MIDDOT (Hebrew) ("[A] liar is like a dead man because the advantage of someone who is alive is his ability to speak; if he nullifies his speech, he nullifies his life.")).

dignity, and the preservation of human life. Sometimes engaging in misrepresentations could substantially advance such objectives. In such situations, Jewish law rejects the proposition that there is a categorical imperative against resorting to misrepresentation. Instead, despite the importance attributed to truthfulness, Jewish law allows, and in some cases even requires, resorting to deceit in order to accomplish certain worthwhile ends. The Talmud[109] proves this by reference to the statement made to Yosef by his brothers after the death of their father Yaakov: "It is permitted to stray from the truth in order to promote peace as it is written, Your father commanded [us before his death] saying: 'Thus shall you say to Yosef: Please forgive [the evil deed of your brothers and their sin . . . .']"[110]

As explained by the traditional commentators, the Talmud assumes that Yaakov never issued such a commandment.[111] When their father died, however, the brothers were afraid that Yosef might avenge himself upon them.[112] They sought to protect themselves and promote fraternal harmony by lying to him.[113]

Next, the Talmud cites Rabbi Natan, who states that lying to promote peace is not just permitted, but it is commanded. Rabbi Natan bases this conclusion on an exchange between G-d and the Prophet Shmuel. G-d directs Shmuel to go to Bethlehem and anoint David as King of Israel to replace Shaul.[114] Shmuel, however, is concerned lest Shaul learn the purpose of his mission and kill him. G-d replies by telling Shmuel to take an animal with him and, if questioned about the reason for his trip, to say that he came to offer a sacrifice to G-d.[115]

Finally, the Talmud accentuates the importance of promoting peace by citing the conduct of G-d Himself:

---

109 BABYLONIAN TALMUD, *Yevamot* 65b.

110 *Genesis* 50:16–:17.

111 *See, e.g.*, SHLOMO BEN YITZHAK (*Rashi*, 1040–1105), COMMENTARY TO GENESIS 50:16 (Hebrew).

112 *Genesis* 50:15.

113 RASHI, *supra* note 111.

114 *Shmuel I*, 16:1.

115 *Shmuel I*, 16:2–:3; *see also* BABYLONIAN TALMUD, *Yevamot* 65b. The Talmudic passage reads as follows:

> Rabbi Natan says: It [*i.e.*, lying to promote peace] is a commandment (*Mitzvah*), as it is written: "And Shmuel said [to G-d]: 'How can I go up [to Bethlehem to anoint David as king]? Shaul will hear about it and kill me. . . .'" [And the Lord said,] "Take a heifer with you, and say, I have come to sacrifice to the Lord."

Id.

> Great is peace because to promote it even G-d altered the truth. At the beginning, it is written [that Sarah said, upon hearing one of the three visitors foretell to Abraham that she would give birth to Isaac] "And my husband is old,"[116] and at the end [when G-d quotes Sarah's comments to Abraham] it says "And I [*i.e.*, Sarah] have grown old."[117]

Commentators explain that G-d was concerned that if Abraham had heard that Sarah had referred to him as old, the relationship between Abraham and Sarah might have suffered.[118]

Other Scriptural verses[119] might also be adduced to justify dissembling in particular settings, but the ones identified in the preceding Talmudic passage seem to be the most commonly cited proofs. Yet these cases suggest possible limitations. For example, ostensibly they fail to prove that explicit lies are permitted other than to prevent the possibility of substantial harm.[120]

Some authorities contend that there are restrictions, such as that unless there are already hostilities, one may not promote peace through an explicit lie, but, instead, may only use ambiguous language.[121] Similarly, some think that one may only misrepresent the

---

116 *Genesis* 18:12.

117 *Id.* 18:13; *see also* BABYLONIAN TALMUD, *Bava Metzia* 87a.

118 *See, e.g., Genesis* 18:13; RASHI, *supra* note 111.

119 For example, the midwives lie to Pharoah about the Jews' birthing process in order to save the lives of Jewish newborns. *See Exodus* 1:19. Similarly, for purposes of safety, Avraham describes his wife as his sister, *see Genesis* 20:2, as does Isaac, *see Genesis* 26:7, of his own wife. When Yosef first sees his brothers in Egypt, he falsely asserts that they are spies, *see Genesis* 42:9, :14, and in the world's most famous maternity case—at least until *Baby "M"*—King Solomon deceptively announces a decision to cut the baby in half. *Kings I* 3:25. Similarly, Yaakov masquerades as Esau in order to receive his father blessings. *See Genesis* 27:19. Many more instances could be adduced. Of course, Jewish law authorities describe some of these cases in ways that prevent them from providing more generalized justifications for deceit. The case of Yaakov and the blessings, for instance, is explained as involving a direct prophecy from G-d to Yaakov's mother, Rivka. *See, e.g.*, AVRAHAM YESHAYAHU KARELITZ, EMUNAH U-BITAHON, *perek* 4, *siman* 13; ONKELOS, TARGUM ONKELOS; *Genesis* 27:13. Under Jewish law, prophecies, on an emergency basis, can authoritatively call for isolated acts that would otherwise be impermissible. *See, e.g.*, RABBI NISSIM BEN REUVEN OF GERONA, COMMENTARY TO BABYLONIAN TALMUD, *Nedarim* 90b, *s.v., Ikha L'Meidak.*

120 The case of Shmuel (and possibly the case of Yosef's brothers), for instance, could be limited to permitting prevarication to avoid a risk of death or great bodily harm. Although the case involving Sarah's statement involved much less risk, the degree of deception permitted in that instance was quite small, amounting perhaps only to omission rather than outright lying. Consequently, one might argue that the three cases do not prove that direct lies can be used to promote peace unless it is necessary to avoid the risk of serious bodily injury.

121 *See generally* FISH, *supra* note 99, at 66–67 (citing various authorities and views).

past or present, but not the future.[122] Nevertheless, it seems that most authorities reject these restrictions.[123] However, normative Jewish law in fact allows express lies for the positive purpose of promoting peaceful interpersonal relations even in the absence of a threat of actual harm. Moreover, a third party can make such statements to promote peace between others. In fact, it is for this that the High Priest Aaron, brother of Moses, was lavishly praised as someone who loved peace.[124] Among the things said about him is that when two people, Reuven and Shimon, quarreled, Aaron would go to Reuven and tell him that Shimon was terribly sorry for what he had done but was too embarrassed to ask Reuven for forgiveness. Aaron would beseech Reuven to go to Shimon and make amends. Aaron would then go to Shimon, say the same things about Reuven, and ask Shimon to reach out to Reuven and reconcile. In this way, Reuven and Shimon would come together and make peace without either of them being embarrassed and without either of them having to admit his guilt.[125] The Talmud and later Jewish law authorities apply an expansive concept of "promoting peace" to permit dishonest means for a variety of objectives,[126] such as to make someone feel better,[127] to avoid embarrassment,[128] to prevent disclosure of a confidence with which one is entrusted,[129] to foil an evildoer's plot,[130] to avoid the exploitation of someone's virtues,[131] to persuade someone as to the proper interpretation of the

122 *Id.* at 67–70 (citing various authorities and views).

123 *See, e.g.*, FISH, *supra* note 99, at 66–70.

124 *See* BABYLONIAN TALMUD, *Sanhedrin* 6b.

125 *See* EISENSTEIN, OTZAR HA-MIDRASHIM (Hebrew), *in* RESPONSA PROJECT 78 (Bar Ilan Univ., Version 7.0); R. SIMHAH OF VITRI, MAHZOR VITRI 424 (Hebrew), *s.v., Hillel u-Shamai.* This type of behavior helped make Aaron more generally beloved among the Jewish people than Moses. *Id.*; *see also* BABYLONIAN TALMUD, *Sanhedrin* 6b.

126 Rabbi Yosef Hayyim (the *Ben Ish Hai*, 1832–1909) cites numerous instances of such conduct throughout the Talmud permitting misrepresentations. *See* YOSEF HAYYIM, TORAH LISHMAH, No. 364 (Hebrew).

127 *See, e.g.*, BABYLONIAN TALMUD, *Nedarim* 50 (to console someone); BABYLONIAN TALMUD, *Ketubot* 17 (according to *Beit Hillel*, to increase the joy of newlyweds); FISH, *supra* note 99, at 62 (citing various examples).

128 *See, e.g.*, BABYLONIAN TALMUD, *Berakhot* 43b; FISH, *supra* note 99, at 182.

129 *See, e.g.*, FISH, *supra* note 99, at 76–77.

130 *See, e.g.*, BABYLONIAN TALMUD, *Yevamot* 106a.

131 *See, e.g.*, BABYLONIAN TALMUD, *Bava Metzia* 23b; RASHI, BABYLONIAN TALMUD, *Bava Metzia* 24a, *s.v.*, "*B'Ushpiza.*"

law,[132] to cause someone to fulfill a commandment,[133] or to enable someone to display personal humility.[134]

How are these rulings consistent with the obligation to distance oneself from falsehood? Some of these cases can be justified on the basis of general, overarching Jewish law doctrines which, while arguably recognizing all lies as intrinsically evil, find that evil justified in particular situations. For example, Jewish law recognizes human life as of almost paramount importance. Consequently, with a few important exceptions,[135] other rules, including the laws against lying, may be violated, if necessary, to preserve life.[136] Nevertheless, these overarching doctrines would not permit relaxation of legal strictures simply to accomplish economic justice.

In other instances, lying may be necessary to fulfill a particular affirmative commandment. Jewish law provides that when there is a conflict between an affirmative commandment (usually understood as a commandment that *requires* commission of an act) and a negative commandment (usually understood as a commandment that *forbids* commission of an act), precedence is given to the former and the act is to be performed. The Jewish law obligation to protect a person from harm, including non-deadly physical harm, as well as financial harm,[137] is arguably an affirmative commandment and, accordingly, may justify a prohibition against lying in order to accomplish such protection.[138]

---

132 *See, e.g.*, BABYLONIAN TALMUD, *Eruvin* 51a; *Ben Ish Hai, supra* note 126 (citing *Tanna d'Bei Eliyahu*).

133 *See, e.g.*, FISH, *supra* note 99, at 57–58.

134 *See, e.g.*, BABYLONIAN TALMUD, *Bava Basra* 8a; RASHI, BABYLONIAN TALMUD, *Bava Metzia* 23b, *s.v.*, "*B'Mesekhet.*"

135 A discussion of these exceptions exceeds the scope of this Essay. *See generally* Steven H. Resnicoff, *Jewish Law Perspectives on Suicide and Physician-Assisted Dying*, 13 J.L. & RELIGION 289, 308–12 (1998–1999).

136 *See generally* SHULHAN ARUKH, *Yoreh De'ah* 157:1; MAIMONIDES, *supra* note 94, *Hilkhot Yesodei HaTorah* 5:2. Jewish law requires that one attempt to prevent a pursuer (a *Rodef*) from killing his intended victim even if one has to kill the *Rodef* to do so. *See generally* Aaron Kirschenbaum, *The Bystander's Duty To Rescue in Jewish Law*, 8 J. RELIGION & ETHICS 204–26 (1980), *reprinted in* JEWISH LAW AND LEGAL THEORY (Martin P. Golding ed., 1993); Resnicoff, *supra* note 135, at 314–16. Another example is that the duty to save a life may justify lying to someone who is critically ill if telling the truth would imperil his or her survival. *See, e.g.*, J. DAVID BLEICH, BIOETHICAL DILEMMAS: A JEWISH PERSPECTIVE 27–60 (1998).

137 *See* Resnicoff, *supra* note 135, at 314–16. *See generally* Kirschenbaum, *supra* note 136.

138 There is a disagreement among Jewish law authorities as to how to classify a commandment as "affirmative" or "negative." *See generally* Resnicoff, *supra* note 135, at 300–01. According to some, the key is the relevant language of the Torah. If the

Of course, it is also arguably unclear whether the commandment *Medevvar Shekker Tirkhah,* to distance oneself from falsehood, is an affirmative commandment or a negative commandment. The obligation is worded in the affirmative, as a duty to actively distance himself from *Shekker,* and one could argue that it obligates a person to take affirmative steps to distance himself from falsehood. Nonetheless, the commandment seems to be understood as a negative one, because, in fact, its function is to tell people not to engage in *Shekker* and not to come too close to *Shekker.* Accordingly, the functionally affirmative commandment not to stand idly by would trump the functionally passive commandment not to lie. Still other general principles might explain a number of additional cases.[139]

According to many authorities, a person may use physical force to fulfill this duty, at least under certain circumstances.[140] If the duty is biblical, then the doctrine discussed in the text, that an affirmative commandment supercedes a negative commandment, might explain why a person could lie to save someone from violating Jewish law. If, however, the duty is rabbinic, another explanation is required. Jewish law provides rabbinic authorities a rarely used right to promulgate du-

---

applicable verse expresses the obligation in positive language that requires an action, the commandment is affirmative. If the Torah expresses it as a prohibition, then the commandment is negative. A second approach, however, focuses on whether the commandment, in fact, requires action. If it does, then the commandment is considered an affirmative commandment.

The Torah commands that one "not stand idly by his fellow's blood." *Leviticus* 19:16. This is construed to require assistance not only when another person is in physical danger, but also when he is danger of financial loss. According to the first approach, this commandment, since it is phrased as a prohibition, is a negative commandment. *See, e.g.,* MOSHE FEINSTEIN, IGGEROT MOSHE, *Yoreh De'ah* II (Hebrew), no. 174:4; ZVI HIRSCH SHAPIRO, DARKEI TESHUVA, *Yoreh De'ah* 157 (Hebrew), no. 57 (citing *Shut Zera Emet* II:51). According to the second approach, however, this commandment, which has the effect of requiring action (because one is told not to stand idly by), is an affirmative commandment. *See, e.g.,* MORDEKHAI BEN MOSHE SCHWADRON, SHUT MAHARSHAM II (Hebrew), no. 54. Consequently, Jewish law would generally require one to violate a negative rule in order to fulfill this affirmative obligation.

139 There is an obligation, under certain circumstances at least, for one Jew to prevent another from transgressing Jewish law. *See generally* Steven H. Resnicoff, *Helping a Client Violate Jewish Law: A Jewish Lawyer's Dilemma, in* JEWISH LAW ASSOCIATION STUDIES X, at 213–214 (H.G. Sprecher ed., 2000); Resnicoff, *supra* note 135, at 324–327. There is a debate as to whether this rule is of biblical or rabbinic status. *See, e.g.,* YITZHAK BELZER, PRI YITZHAK I (Hebrew), no. 53 (printing a responsum of R. Naftali Amsterdam that discusses these views and concludes that the duty is biblical); ABRAHAM SAMUEL BENJAMIN WOLF SOFER (1815–1871), KETAV SOFER, *Yoreh De'ah* 83 (citing various views).

140 *See, e.g.,* YAAKOV YESHAYAHU BLAU (contemporary), PITHEI HOSHEN (Hebrew), *Hilkhot Nizikin, perek* 2, *halakha* 6.

ties that would allow, or require, means otherwise forbidden. It is possible that the rabbis relied upon this authority when they established the duty to prevent a fellow Jew from sinning. If so, their enactment may have permitted not only the use of physical force, but the use of lies as well.

These various doctrines, however, do not seem sufficient to cover all leniencies as to truth telling, especially those in which lies are employed simply to help cultivate more peaceful relations rather than to avert some possible harm or transgression. The rule against lying is relaxed under circumstances in which other prohibitions would remain intact. As a result, additional explanation is needed.

A bold suggestion is offered by Rabbi Eliyahu Dessler (1891–1954) who takes a counter-intuitive approach to the definition of the terms "truth" and "falsehood." He contends that statements conducive to that which is "good" (i.e., to a result desired by G-d) are "true" and those that impede such a result are "false."[141] Sometimes statements that inaccurately reflect reality are nonetheless conducive

---

141 Rav Dessler states

> What is truth and what is falsehood? When we went to school we were taught that truth is to tell the facts as they occurred and falsehood is to deviate from this.
>
> This is true in simple cases, but in life many occasions arise when this simple definition no longer holds good. Sometimes it may be wrong to "tell the truth" about our neighbor, unless overriding purpose and necessity require this. And sometimes it may be necessary to change details, when the plain truth would bring not benefit but injury. In such cases what appears to be true is false, since it produces evil effects; and what appears to be false may help to achieve the truth.
>
> We had better define truth as that which is conducive to good and in conformity with the will of the Creator, and falsehood as that which furthers the scheme of the Prince of Falsehood, the power of evil in the world.

1 ELIYAHU E. DESSLER, STRIVE FOR TRUTH 267 (Aryeh Carmell trans., 1978). A somewhat similar thought is expressed by the author of Alei Shor:

> It is well known that the prohibition of *Loshon ha-Rah* is to say something that is true but it is said for the purpose of harming [someone], and the Scriptural warning against engaging in *Loshon ha-Rah* comes from the verse, "Do not accept a false report." . . . Ostensibly this requires careful examination because the Scriptural warning is against *Loshon ha-Rah* and the translation calls this accepting a false report—but *Loshon ha-Rah* is the truth! Therefore, we are forced to understand that a wrongful intention makes a true thing to be false. It turns out that falsehood is not just the distortion of the facts but even if the facts are true but they are said for an evil purpose, [the statement] is false!

FISH, *supra* note 99, at 204. Rav Dessler simply goes beyond and says that a good purpose can transform a distortion of the facts into truth.

to good. According to R. Dessler, such statements would be defined as "true."[142]

R. Eliezer ben Shmuel of Metz (*Re'em*, twelfth century) adopts a slightly different position. He does not deny that statements that do not reflect reality are false. Instead, he maintains that the commandment to distance oneself from falsehood only applies to falsehoods that are intended to cause harm.[143]

Thus, according to R. Dessler and *Re'em* the fact that it is permissible to lie in order to accomplish a desirable objective is not an "exception" to the rule against falsehoods. Rather, R. Dessler views the statements as "truths,"[144] and *Re'em*, while considering the statements to be lies, believes that the duty to distance oneself from lies never applied to well-intended lies.[145] These views are arguably consistent with the conclusion that falsehoods are not intrinsically evil.

A variation on *Re'em*'s theme would be to assume that, while the commandment to distance oneself from falsehood may apply even to some well-intended lies, there are a variety of specific exceptions based on assorted sources and not merely exceptions derived from general Jewish law doctrines.

C. Straying from the Truth To Promote Valid Financial Interests

Jewish law appears to allow someone to lie outside of court to vindicate his or her rightful financial interests. The Talmud, for instance, discusses a case in which Rabbi Yehudah and Rabbi Yosi entrusted their purses to an innkeeper who subsequently denied that he

142 Novel definitional approaches have also been embraced by philosophers who were not Jewish law authorities. Thus, Hugo Grotius (1583–1645) contended that one who utters a falsehood to a person, such as a thief, who has no "right" to the truth is not "lying." *See* BOK, *supra* note 37, at 14–15.

143 *See* ELIEZER BEN R. SHMUEL OF METZ (*Re'em*, twelfth century) SEFER YE'REIM (Hebrew) 235; *see also* ISAAC STERNHELL (twentieth century), KOKHAVEI YITZHAK (Hebrew), no. 16 (citing this view); WALTER S. WURZBURGER (contemporary), ETHICS OF RESPONSIBILITY: PLURALISTIC APPROACHES TO COVENANTAL ETHICS 88 (1994). These commentators are among many who cite, but do not necessarily agree with, the view of the *Re'em*. An interesting difference arguably arises between Rav Dessler and the *Re'em* in a case in which a person distorts the truth for neither a good nor bad reason. According to the *Re'em*, the distortion is a falsehood, but the Torah did not prohibit it. According to Rav Dessler, the absence of a good purpose might leave the distortion as a falsehood and, possibly, prohibited. Interestingly, argues that a falsehood that does not cause any harm is nonetheless a prohibited falsehood. *See Hazon Ish*, *supra* note 119.

144 Rabbi Dressler regards factually untrue statements as "truthful" so long as they are uttered to accomplish a morally good purpose. *See supra* note 141.

145 RE'EM, *supra* note 143.

had received the purses.[146] From observing the innkeeper, the rabbis deduced that, at his last meal, the innkeeper had eaten lentils.[147] When the innkeeper was away from his home, the rabbis went to the innkeeper's wife and told her that the innkeeper had sent them to get their purses. As a sign that they were telling the truth, the rabbis said the innkeeper had told them to say that his last meal had consisted of lentils.[148]

Similarly, suppose a person hires employees to do a certain project, and the employees threaten to back out. The Talmud states that if the employer would suffer a loss should the employees carry out their threat, the employer may trick them by promising to pay more if they will continue to work.[149] After the fact, however, he need only pay the original agreed-upon price.[150]

Interestingly, traditional American common law adopted the same rule, at least as to lay persons and obligations arising out of contracts for the provision of service.[151] Suppose a person has a preexisting contractual duty to pay money or provide services, but refuses to

---

146 *See* BABYLONIAN TALMUD, *Yuma* 83b.

147 Jewish law requires a person to wash one's hands before and after a meal at which bread is eaten. At the end of a meal, it is customary for someone to wipe his mustache clean with his still damp hands. Just as the innkeeper was not observant as to the rules against withholding the purses that were entrusted to him, he was also unobservant of the rules about washing after a meal. As a result, a bit of lentils was still in the man's mustache. Seeing this, the rabbis deduced that the innkeeper had eaten lentils at his last meal. *See id.*

148 Similarly, an ancient, non-legal source, PESIKTAH RABBATI (Hebrew), *parsha* 22, states that the Prophet Eliyahu appeared to someone in a dream and advised him to use this same stratagem to recover money that he had entrusted to another. *See also* FISH, *supra* note 99, at 90.

149 BABYLONIAN TALMUD, *Bava Metzia* 75b–76a.

150 *See id.*; *see also* SHULHAN ARUKH, *Hoshen Mishpat* 333:5. Rabbi Yaakov Yeshayahu Blau, however, suggests that this case might be characterized as one that does not involve deceit. *See* BLAU, *supra* note 140, *Hilkhot Halva'ah VeAveidah*, *perek* 6, *halakha* 1, n.5. If the employer had been forced to agree to pay a higher wage to alternative employees, he could have sued the original employees for the loss their wrongful withdrawal caused. This loss would be the difference between the original price and the higher price ultimately paid to the substitutes. Where the initial employees agree to continue working for a higher price, the employer is ultimately only required to pay the original wage. R. Blau argues that the employer may be perceived as fulfilling his promise to pay a higher wage but, before paying it out, the employer reduces it by the loss the employees caused him. *Id.* Since the loss is the difference between the higher price and the original price, once the employer reduces the higher price by this amount, the employer is only obligated to pay the original amount. *See id.*

151 Under traditional common law, in fact, the employer would not have been sanctioned for lying even if he could have hired replacement workers without suffering any financial loss. Some modern American courts, however, may follow a rule,

do so. To induce him to reaffirm his obligation to perform, the obligee promises to pay more money. In most American jurisdictions, even if the obligor reaffirms and fulfills his performance, the obligee will not be required to fulfill its side of the "new" bargain. Why? The contract was not enforceably modified against the obligee because he did not receive "consideration" for his new promise. The obligor's promise to do that which he was already duty-bound to perform is not consideration. Nor is the obligee liable in damages for the tort of "deceit," because the obligor suffered no damages. The obligor was obligated to perform before the obligee's new promise; performance of one's duty is not deemed to constitute damages.

In a case illustrating these principles, a lender initiated foreclosure proceedings against a debtor who was in default.[152] The lender agreed to dismiss its foreclosure action and give the debtor some additional time if the debtor would at least pay the overdue interest.[153] Although the debtor paid the interest, the lender proceeded with the foreclosure.[154] When the debtor sued for breach of contract and deceit, it lost.[155] Because the debtor was already obligated to pay the interest (as well as the overdue principle), by promising to do so, the debtor did not provide any new "consideration" which would make the lender's reciprocal promise legally enforceable.[156] Paying the overdue interest was the debtor's legal obligation and causing him to do so was not causing him any legal harm.[157]

---

announced in the *Restatement (Second) of Contracts* section 89 that, in some circumstances, would bind the obligee to the new terms. This Restatement provision states

> A promise modifying a duty under a contract not fully performed on either side is binding
>
> (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
>
> (b) to the extent provided by statute; or
>
> (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

RESTATEMENT (SECOND) OF CONTRACTS § 89 (1979). Similarly, virtually all states have adopted Article 2 of the Uniform Commercial Code, which applies to contracts for the sale of goods. *See* FARNSWORTH, CONTRACTS § 1.9 (2d ed. 1990). Article 2 provides that a modification of a contract is valid, even if it is not supported by new consideration. *See* U.C.C. § 2-209 (1977).

152 Sinclair v. State Bank of Jerseyville, 566 N.E.2d 44, 45 (Ill. App. Ct. 1991).

153 *Id.*

154 *Id.*

155 *See id.*

156 *See id.* at 45–47.

157 *See id.* at 47.

D. Lying, Lawyers, and Rabbinical Court

Jewish law rejects role-differentiated morality. The same ethical rules apply to everyone, irrespective of his professional identity. Nevertheless, as matters approach a rabbinic court, the requirement of truthfulness becomes the subject of a more complex debate, primarily because of specific biblical rules regarding the creation and maintenance of such courts and the responsibility towards them. Consequently, an examination of the detailed and disputing views of Jewish authorities, and the specific Talmudic sources on which they respectively rely, as to the ethical rules applying to in-court conduct is beyond the scope of this Article.

E. Truth Telling Can Be Evil

Consistent with its view that lying to promote important values is proper, Jewish law thinks that telling the truth can be evil. Jewish law obviously takes this position in those cases in which lying is required, such as to save someone's life or property. But even when lying is not required, the volunteering of information can be evil—even if the information is truthful.

Perhaps the most poignant and pervasive example of this Jewish law position concerns its rules prohibiting the disclosure of (1) private or (2) unflattering information or opinions. Under Jewish law, an individual enjoys an expansive right to privacy as to information he communicates to others, irrespective of whether the others are professionals or non-professionals.[158] Thus, if A says something about himself to B, and it is apparent that A would not like the information revealed to anyone else, B is forbidden to tell it to anyone else, even if A never expressly asked B not to disclose it.[159] If A communicated to B derogatory information about C, then A violated a Jewish law prohibition (*Lashon ha-Rah*) similar to secular defamation.[160] If B believes the information about C or repeats it to someone other than C, he, too, is guilty of *Lashon ha-Rah*. If B repeats A's statement to C, B is guilty of an additional offense, *Rekhilut*.[161] While *Lashon ha-Rah* involves possible damage to C's reputation, *Rekhilut* involves damage to

158 *See* J. David Bleich, *Rabbinic Confidentiality*, 33 TRADITION 54, 57 (1999) ("Judaism binds each and every one of its adherents, laymen as well as professionals, by an obligation of confidentiality far broader than that posited by any other legal, religious or moral system.").

159 *See id.* at 57–64.

160 *See generally Lashon ha-Ra*, *in* 10 ENCYCLOPAEDIA JUDAICA, *supra* note 76, at 1431; *Slander*, *in* 14 ENCYCLOPEDIA JUDAICA, *supra* note 76, at 1651.

161 *See* AARON LEVINE, CASE STUDIES IN JEWISH BUSINESS ETHICS 63 (2000).

the relationship between A and C. While Jewish law does permit disclosure in some circumstances in order to protect an innocent person from harm, the mere fact that the information is true is *not* a defense.

By contrast to Jewish law, and consistent with legal ethics's categorical imperative approach against lying, secular law generally regards truth as a defense to actions for defamation and, often, invasion of privacy. Jewish law, however, regards such disclosure as harmful—and evil—absent some special countervailing need for revelation.

III. Comparative Observations

Jewish law does not permit people, whatever their profession, to promote unjust ends through deceit—or even through truth telling! While Jewish law highly treasures the truth and usually insists upon it, Jewish law prizes certain other values, including the preservation of human life and the promotion of justice, even more. Consequently, in evaluating the morality of a particular course of conduct, Jewish law is primarily concerned with the ends to be accomplished, and not with whether the means to be used are truthful or untruthful.

By contrast, secular legal ethics rules adopt a categorical imperative that people whose profession is to practice law ought never to engage in deception or misrepresentation, even in their non-professional lives and irrespective of higher countervailing values. The societal costs of such a rule appear unjustified. Not only does such a rule seem unlikely to enhance the esteem with which the public holds lawyers and the judicial system, it may actually diminish such esteem.

In light of the observations made in Part I and the Jewish-law approach discussed in Part II, the secular system might consider changing its categorical imperative approach in various ways. It might, for instance, jettison its rule entirely or at least with respect to certain kinds of attorney misrepresentations—such as those arising in transactions in which the person does not serve as an attorney, in matters unrelated to ongoing litigation, in situations in which the attorney is not perceived to be betraying the attorney-client relationship, or in situations not involving communications to a tribunal.

Of course, abandonment of the categorical imperative approach—whether in whole or in part—may raise certain problems. First, by contrast to Jewish law, which, as discussed in Part II, provides importance guidance as to the relative priorities attributed to truthfulness and various competing ethical goals,[162] there is little secular consensus as to such priorities. Nevertheless, the legal profession could

162 Jewish law provides considerable room for the exercise of an individual's autonomy. *See* Steven H. Resnicoff, *Professional Ethics and Autonomy: A Theological Critique,*

address this problem in any number of ways. It might, for instance, attempt to reach a consensus as to some specific exceptions, such as the saving of life, just as it has done with respect to its rules regarding confidentiality.[163] Alternatively, it might decide not to discipline lawyers professionally with respect to particular kinds of misrepresentation, at least where they do not constitute a violation of secular law. At the same time, however, the bar regulators might want to gather—and make available to prospective clients and others—information regarding allegations of all types of misrepresentation by specific attorneys. In this way, the regulators might act in the nature of a "better business bureau."

Second, the secular system may be concerned that a person, because of his or her personal bias, would misapply any formula that might be articulated for determining when prevarication would be permitted.[164] Jewish law also recognizes the possibly pernicious effects of bias, even in applying its *relatively* specific rules. Indeed, Jewish law provides rules that pervasively affect a person's life, and the problem of bias affecting the decisionmaking process is always present. It relies on two principal safeguards. The first is that the *Mishnah,* in the section known as "the Ethics of the Fathers," prescribes that one should "make for himself a Teacher."[165] This means that a person is supposed to seek out a pious scholar and learn from him. Thus, people are encouraged to seek guidance from wise and pious Jewish scholars, whose perspective should be more objective. Within the communities that follow Jewish law, such advice is in fact very frequently sought as to all sorts of Jewish law questions. The second safeguard is that, for those who are committed to Jewish law, there is an awareness of G-d, a genuine desire to do His Will, and, as well, a concern for possible Divine retribution. These factors not only en-

---

in LAW AND RELIGION: CURRENT LEGAL ISSUES 329 (Richard O'Dair & Andrew Lewis eds., 2001).

163 Perhaps the consensus as to such specific ethical choices should be made by a process that is not dominated by lawyers or judges. The important involvement of other ethicists or lay persons, at the rulemaking level, might be salutary. Consideration of this issue, of course, exceeds our present purview.

164 *See* BOK, *supra* note 37, at 26.

> Bias skews all judgment, but never more so than in the search for good reasons to deceive. Not only does it combine with ignorance and uncertainty so that liars are apt to overestimate their own good will, high motives, and chances to escape detection; it leads also to overconfidence in their own imperviousness to the personal entanglements, worries, and loss of integrity which might so easily beset them.

Id.

165 MISHNAH, *Pirkei Avot* I:6, at 16.

courage Jews to solicit sage advice, but, where, perhaps because of practical constraints such guidance is unavailable they also tend to counteract other biases.

It is unclear precisely how serious the misapplication of a formula problem would be for the secular system. After all, the secular rules provide such formulae in other areas, such as confidentiality, and lives with the prospect of possible bias. Furthermore, various attorney disciplinary authorities are providing additional resources—in the nature of "hot-lines" and the like—which could be further structured or developed to provide attorneys with guidance as to the permissibility of particular misrepresentations.

A third problem for non-Jewish approaches is the apprehension that deceit will have deleterious psychological effects, which cannot be readily predicted or quantified, on the liar's own sense of integrity and self-respect.[166] Such harmful consequences, however, seem most likely when one lies for selfish purposes on the basis of the individual's own ad hoc or intuitive decisionmaking process. The problem seems much less significant in the context of Jewish law, where the deceit is perpetrated for a worthy purpose and according to religiously mandated guidelines. The problem should be ameliorated from a secular perspective to the extent that secular authorities can similarly succeed in articulating a consensus on specific choices.

Finally, there may be trepidation that permitting some lying, albeit in justified instances, might open the floodgates to waves of unjustified deceit.[167] Jewish law, because of its rich legal literature and reliance on precedent, is somewhat protected from any dilution of its formal rules. Jewish law does, however, recognize that a person is influenced by his conduct, and that, if one commits a wrongful act, it becomes easier for him to repeat it.[168] The social psychology theory

---

166 *See* BOK, *supra* note 37, at xix.

> The most serious miscalculation people make when weighing lies is to evaluate the cost and benefits of a particular lie in an isolated case, and then to favor lies if the benefits seem to outweigh the costs. In so doing, they risk blinding themselves to the effect that such lying can have on their integrity and self-respect, and to the jeopardy in which they place others.

Id.

167 *See id.* at 25.

> After the first lies, moreover, others can come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp.

Id.

168 The Talmud explains that a person who commits a sin and repeats it no longer feels the same degree of reluctance to engage in the conduct again. It becomes as if

of cognitive dissonance suggests this phenomenon when it describes the "induced-compliance paradigm."[169] Essentially, when a person is engaged in activities that he believes are wrong, he develops unpleasant feelings of guilt. If he cannot change his conduct, then, in order to relieve his guilt, he changes his attitude and no longer considers the activities to be wrongful.[170]

Thus, even if someone initially believes that lying is wrong, once he does it, he alters his attitude to alleviate his sense of guilt. Even the fact that the act was done for a worthy purpose, for example to fulfill a religious duty, does not necessarily always shelter the person from the desensitizing effect of the conduct.[171] Consequently, Jewish law encourages the use of deceit only when the positive goal cannot otherwise be accomplished, and it permits express deceit only when ambiguity would be ineffective.[172] Thus, after citing the various cases in which it is permitted to lie, the anonymous author of *Orhot Tzaddikim*, first published in Yiddish in 1542, states:

---

the act were "permitted." *See, e.g.*, BABYLONIAN TALMUD, *Yuma* 86b, 87a; *Moed Koton* 27a, 27b; *Kiddushin* 22a, 40a; *Soteh* 20a; *Erekhin* 30b. In this way, a person is a product of his actions. HA-LEVI, *supra* note 63, *Commandment* 16. Similarly, Aristotle states, "The man, then, must be a perfect fool who is unaware that people's characters take their bias from the stead direction of their activities." ARISTOTLE, THE ETHICS OF ARISTOTLE 91, 108 (J.A.K. Thompson trans., Penguin Books 1953). Hamlet apparently acknowledges this process when speaking to his mother:

> Good night; but go not to my uncle's bed;
> Assume a virtue, if you have it not.
> That monster, custom, who all sense doth eat
> Of habits devil, is angel yet in this,
> That to the Use of Actions Far and,
> He likewise gives a frock or Livery,
> That aptly is put on. Refrain tonight,
> And that shall lend a kind of easiness
> To the next abstinence; the next more easy;
> For use almost can change the stamp of nature
> And either [tame] the devil or through him out.

WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 4.

169 *See* Davida H. Isaacs, *"It's Nothing Personal"—But Should It Be?: Finding Agent Liability of Violations of the Federal Employment Discrimination Statutes*, 22 N.Y.U. REV. L. & SOC. CHANGE 505, 528 (1996).

170 *See id.*

171 *See* Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics*, 15 TOURO L. REV. 73, 102–03 (1998).

172 This preference is arguably reflected in Abraham's choice in referring to his wife, Sarah, as his "sister" rather than disclaiming any relationship at all with her. As Avraham explains to Avimelech, *see Genesis* 20:12, there was some justification for this reference.

> In all of these cases in which the sages allowed one to lie, if it is possible to accomplish [the worthy objective] without lying it is better [to do so] than [by] lying, such as if they ask him, "Do you know [i.e., are you well-versed in] Talmudic tractate such-and-such?", he should [humbly] answer, "And would you think that [somewhat like] I would know [it]?" And if [this answer does not end the discussion and] he can elude the questioner in another way without lying, it would be very good.[173]

Furthermore, many authorities emphasize that even then a Jew may only infrequently use deceit lest he become habituated to it.[174] In other words, if a Jew frequently finds himself in situations in which he would otherwise be permitted to lie to promote different important Jewish values, he is not allowed to do so, because repetitious deceit can be habit forming.[175]

The Talmud gives the following example:

> Rav was constantly tormented by his wife. If he said to her, "Prepare me lentils," she would prepare him small peas. [If he asked for] small peas, she prepared him lentils. When his son Hiyya grew up, he [Hiyya] gave her [his father's instructions] in the reverse order [i.e., if his father asked for lentils, Hiyya told his mother that his father wanted small peas, and vice versa]. [Rav] told him: "Your mother has improved." He [Hiyya] replied, "It was I who reversed [your orders] to her." [Rav] told him "This is what people say: 'Your own offspring teaches you reason.' Nevertheless, you should not continue to do this, for it is said, 'They have taught their tongue to speak lies, trying to do evil. . . .'" [Jer. IX:4][176]

To the extent that the secularly permitted scope of lying is limited, however, the problem of habituation is minimized. Moreover, other mechanisms, such as required continued legal education specifically dealing with legal ethics and lying could ensure that lawyers remain sensitive to the relevant rules and to their compelling ethical authority.

---

173 ORHOT TZADDIKIM, *Sha'ar ha-Shekker, s.v., "u-Pe'amin Shehetiru," in* RESPONSA PROJECT (Bar Ilan Univ., Version 7.0).

174 *See, e.g.*, FISH, *supra* note 99, at 49 (citing various authorities); *Rashbatz, supra* note 81.

175 In a different context, Rav Eliashiv (contemporary) used the fact that a person might constantly repeat an act to rule stringently. In the case he was addressing, the improper act would arise in the context of someone's employment. Even assuming that a person would not otherwise be required to give up his job to avoid doing the action once, R. Eliashiv ruled that a person must give up the job if the job would require the conduct to be constantly repeated. *See* AVRAHAM BEN AVRAHAM, NISHMAT AVRAHAM IV, at 95 (Hebrew).

176 BABYLONIAN TALMUD, *Yevamot* 63a.

In short, despite the foregoing problems, the secular legal profession should be able to reach and articulate a general consensus that, at least in some scenarios, lying by lawyers would not harm the profession. Indeed, rules permitting or even prescribing deception in such cases might promote justice without any impairment, and perhaps even some improvement, of the public's perception as to the integrity of the legal system. At the same time, similarly advantageous results might be achieved if greater prohibitions were imposed on the deceptive tactics that attorneys currently employ to mislead the trier of fact or to harass or humiliate honest witnesses.