

# Nonspecific perjury

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# Nonspecific Perjury<sup>1</sup>

## Abstract

Since 1970, a United States prosecutor can prove perjury without specifying which statement is perjurious. A bold prosecutor could concede ignorance of which statement is false. A bolder prosecutor could further concede that the witness himself does not know. The boldest prosecutor could concede there is no specific lie. Instead of there being a statement that is intrinsically perjurious, the perjury is relational. Just as two statements can be inconsistent without either being inconsistent, two statements can be perjurious without either being perjurious. These consequences are reconciled with the generalization that all perjury involves lying. Corollaries about culpability are drawn from the phenomenon of nonspecific perjury. The reasoning is generalized to other forms of illegal lying.

Keywords: Perjury, Inconsistency, Specificity, False Statements, Intuitionism, Lying

## 1. Introduction

The Organized Crime Control Act of 1970 enables prosecutors in the United States to prove perjury by virtue of one statement under oath contradicting another.<sup>2</sup> The prosecutor's

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<sup>1</sup> This essay was presented to the Logic and Metaphysics seminar University of St. Andrews in Scotland. I am grateful to Sidney DeLong, Alexander Sarch and an anonymous referee for helpful comments and suggestions.

<sup>2</sup> 18 U.S.C. § 1623(c) (1982).

knowledge of perjury need not be specific; she knows some of the statements are perjurious but there is no statement such that she knows it is perjurious.<sup>3</sup>

What follows is a philosophical development and defense. The level of abstraction is intended to sustain generalizations to other species of illegal lying. These crimes and torts are surveyed in the final section.

My *epistemological* thesis is that the perjurer's knowledge of his own present perjury can be as nonspecific as the prosecutor's. Sometimes there exists a specific lie but the liar does not know what it is. For instance, people sometimes answer despite uncertainty as to which question was asked. If all Mr. Polite heard was 'Did you \_\_\_\_?', answering 'Yes' is a lie despite ignorance as to which lie he told. If Mr. Polite answers another question he does not understand, he may discover that his answers are inconsistent. He may only later learn which propositions constitute the inconsistency. If this phased enlightenment transpires during cross-examination, the prosecutor may be the first to know which lies Mr. Polite told.

My *metaphysical* thesis is that sometimes the explanation of the perjurer's absence of knowledge of a perjurious statement is the absence of a specific lie. A prosecutor can know that some statements are inconsistent while knowing that each statement is consistent by itself.<sup>4</sup>

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<sup>3</sup> Model Penal Code § 241.1(5) (1980).

<sup>4</sup> Illustration: 'Some stole' is consistent. 'None stole' is consistent. But they are inconsistent. In contrast to the relative inconsistency of these two propositions, 'Something is distinct from itself' is inconsistent on its own. The logical form of this absolute contradiction,  $(\exists x) x \neq x$ , refutes the generalization each contradiction is composed of consistent propositions that contradict each other (as with stereotypical contradictions of the form  $p \ \& \ \sim p$ ).

Similarly, a prosecutor can know some statements are perjurious while knowing each is non-perjurious. For the inconsistency often suffices to demonstrate that the speaker deliberately disengaged what he asserted from what he believed.

## **2. Awareness that one is lying**

The speaker lies exactly when that disengagement causes a mismatch between what he asserts and what he believes. Given that his disengagement is known by introspection, the speaker has a notorious advantage over his fellow mortals. To assure others that he is not exploiting his privileged access, a speaker may leverage his belief in an omniscient judge. If listeners think Mr. Panopticon believes his mental states are telepathically policed, then the listeners have evidence that Mr. Panopticon believes what he is saying. The assurance works regardless of whether the listener agrees that there is supernatural surveillance. Mr. Panopticon appreciates this generality. He can gain credibility by leveraging his theism even when addressing atheists. Secular economists are not surprised that the default oath for legal testimony is theological.<sup>5</sup>

Normally, the liar is the first to know the identity of his lie. According to Elizabeth Anscombe, whenever you act intentionally, you know what you are doing (under the relevant description) without any need for observation.<sup>6</sup> Lying is an intentional action. Consequently, if you choose to tell the lie that you are pleased by a gift, you thereby know that you are telling the lie that you are pleased. This gives you a head start. Others can only know that you are lying by observation.

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<sup>5</sup> Peter T. Leeson, 'Ordeals' (2012) *The Journal of Law & Economics* 55 691.

<sup>6</sup> Elizabeth Anscombe, *Intention* (Basil Blackwell, 1957) 54.

The creative aspect of lying is extolled by the aesthete, Vivian, in Oscar Wilde's anti-Platonic dialogue 'On the Decay of Lying'.<sup>7</sup> Vivian contends art aims at telling beautiful falsehoods.<sup>8</sup>

Vivian neglects a classic rebuttal made by Philip Sidney in his 1595 defense of poetry: 'Now for the poet, he nothing affirmeth, and therefore never lieth.'<sup>9</sup> The liar is confined to the genre of *nonfiction*. Instead of flaunting the active aspect of his story telling, the liar disguises his invention as a passive description.

Thanks to the liar's agential knowledge of his freshly minted secret, the liar is the first to recognize relevant evidence that might expose his imaginativeness. This priority puts the liar in a position to forestall suspicion. The liar's superior knowledge of his lie is reflected in lists of 'tells'. These signs of lying are for the edification of those hearing lies. They are not for edification of the liar.

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<sup>7</sup> Wilde, Oscar, *Intentions* (James R. Osgood, 1891).

<sup>8</sup> The inventor of Vivian revealed a punitive attitude toward lying when he prosecuted the Marquess of Queensbury for criminal libel in 1895. To avoid a two year prison sentence under the 1843 Libel Act, Queensbury had to prove his written allegation that Oscar Wilde committed sodomy. Queensbury succeeded with the help of private detectives. Shocked, Wilde dropped the suit. Too late! The uncovered evidence led Wilde to be convicted of gross indecency. It was Wilde rather than Queensbury who was sentenced to two years in prison.

<sup>9</sup> Phillip Sidney, *An Apology for Poetry* Forrest Robinson (ed) (Bobbs Merrill, 1970) 53.

Polygraph operators aim to detect deliberate decoupling of assertion from belief. The lie detector thereby distinguishes lies from mistakes, malapropisms, and deliberately misleading truth-telling. Polygraph operators further aim to distinguish a person who unwittingly repeats someone else's lie from a genuine liar. All of these nuances are designed to educate the observer, not the subject undergoing the lie detector test. When the subject asks, 'When will I know the result of the test?' the polygraph operator exclaims, 'Immediately!'. Others must wait for the machine's results but the liar knows he is lying as soon as he lies.

Since the liar knows what he is saying he also knows exactly which lie he is telling. The liar's knowledge of his own lying is unavoidably specific. Ignorance of which lie one is telling is as impossible as the sufferer of a dizzy spell being ignorant of which person is dizzy. There is no gap between me telling a lie and me identifying which lie I am telling.

To level the playing field, one might relax the requirement that the lie catcher match the specificity of the liar's knowledge of which assertion is a lie. The Organized Crime Control Act of 1970 was intended to relieve the government of the responsibility of identifying which of several inconsistent declarations is false.<sup>10</sup> The aim was to 'facilitate perjury prosecutions and thereby enhance the reliability of testimony before [f]ederal grand juries'.<sup>11</sup>

The legislators presuppose that the liar knows which lie he is telling. If asked to justify their presupposition, they might repeat a definition widely attributed Mark Twain: Lying 'is

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<sup>10</sup> *Dunn v. United States*, 442 U.S. 100, 108 9 (1979).

<sup>11</sup> *United States v. Clifton*, 406 F.3d 1173, 1177 (10<sup>th</sup> Circ. 2005).

telling someone something you know ain't so'.<sup>12</sup> This definition is espoused by some 'knowledge-first' epistemologists.<sup>13</sup> Their norm of assertion is: 'Tell others only what one knows'. 'Lie' flags intentional violations of this norm.

'Lying is telling someone what you know to be false' resonates with definitions of 'perjury' that contain a clause stating that the perjurer knows that his testimony is false. Yet the definitions are also influenced by Augustine's fourth century definition: lying is a deliberate departure from *believed* truth (*truthfulness* rather than truth). For the definitions widen 'perjury' to include those who *believed* they knew their testimony was false. Alternatively, the assertion of p is treated *as if* it were an assertion that one knows that p.<sup>14</sup> Sometimes different adjustments are included to cover different sub-species of perjury. The ensuing complexities for perjury are organized with a table.<sup>15</sup> Enhancements of perjury charges also invite summary by tables.

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<sup>12</sup> This is actually a modification of a quotation about *faith*. The speaker is the schoolboy in Mark Twain's *Following the Equator*, chapter 12, 'Pudd'nhead Wilson's New Calendar' (American Publishing Company 1898).

<sup>13</sup> Ben Holguín, 'Lying and knowing' (2019) *Synthese* 198 5351.

<sup>14</sup> California Penal Code attributes perjury to any sworn testifier who 'willfully and contrary to the oath, states as true any material matter which he or she knows to be false' § 118. Skeptics who are tempted to conclude that they cannot commit perjury should read on: 'An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.' CA Penal Code § 125 (2022). Federal Rule of Evidence 602 raises the expectation that witness testimony will be based on personal knowledge.

<sup>15</sup> S. Mah, T. Hamsher, J. Hughes, and A. Moody, (2020). 'Perjury' *Am. Crim. L. Rev.*, 57 1115.

Augustine initially contends that all jokes are lies. A few years later, in 'On Lying', this former professor of rhetoric reverses his verdict about these comedic falsehoods; the joker 'has in mind no deceit'.<sup>16</sup> This new requirement, that lying requires an intent to deceive, clears hyperbole, sarcasm, and metaphor. Almost all twentieth century philosophers aligned with Augustine's narrowed definition.

In the thirteenth century (and in the past two decades), many commentators rejected the requirement that the liar intend to deceive the addressee. Aquinas' theoretical basis was the recent rediscovery of Aristotle's teleology. The natural function of the language organ is to communicate truth: '[A]s words are naturally signs of intellectual acts, it is unnatural and undue for anyone to signify by words something that is not in his mind'<sup>17</sup>. Lying is a sin of the tongue, akin to that of a glutton using his mouth to feast and purge so that he can eat some more. Focus on the liar's perversion rather than cognitive harm to his victim leaves open the possibility of addressing a lie to a being whom one regards as omniscient. Aquinas defines 'perjury' purely theologically as the act of calling God as a witness to one's false testimony.<sup>18</sup> The function of an oath is to supplement the reliability of testimony. Abuse of oaths is therefore unnatural. Perjury is doubly perverted.

For Aquinas, the intent to deceive is no more essential to lying than an archer's intent to hit a target. An archer can shoot an arrow without aiming at any target. An intimidated witness

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<sup>16</sup> Augustine (1952) 'On Lying,' M. S. Muldowney (trans.) in R. J. Deferrari (ed.) *Fathers of the Church* (Volume 16: *Treatises on Various Subjects*), (Fathers of the Church) 1.2.

<sup>17</sup> Aquinas, Thomas *Summa Theologiae* (McGraw-Hill, 1972) qu. 110, art. 3.

<sup>18</sup> Ibid. qu. 98 art. 2.



may tell an obvious lie without the intention to deceive the judge or jury. His plan may be to discredit himself as a witness. The intent to deceive is only one motive among many alternative motivations for lying.<sup>19</sup>

In the twenty first century, the basis for rejecting the intent to deceive switched from theology and teleology to a secular combination of linguistics, philosophy of language, and epistemology. Premises from these fields are also marshalled against the requirement that the liar *know* his lie be false.<sup>20</sup> Rejecting both the knowledge requirement (that liar know that what he said is false) and the intention requirement (that the liar intends to deceive the hearer) returns us to a definition resembling Augustine's pre-intentional definition: Lying is asserting what you do not believe based on a *deliberate* disengagement of assertion from belief.<sup>21</sup>

### **3. Misspoken cross-examiners**

In William Shakespeare's plays, the low-class Mistress Quickly is prone to pretentious malapropisms. She reports that Sir John Falstaff 'is indited to dinner' when she really believes Falstaff is *invited* to dinner. When merely misspeaking, Mistress Quickly's disengagement of assertion from belief is contrary to her intention and therefore is not lying.

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<sup>19</sup> Andrew Sneddon, 'Alternative motivation and lies' (2021) *Analysis* 81(1):46.

<sup>20</sup> Neri Marsili, 'Lying: Knowledge or belief?' (2021) 179 *Philosophical Studies* 1445.

<sup>21</sup> Roy Sorensen, 'What lies behind misspeaking' (2011) 48 *American Philosophical Quarterly* 399.

When lying to Falstaff about Mrs. Ford being smitten by his love letter, Quickly conspiratorially guides her assertion with the *supposition* that Mrs. Ford loves Falstaff. Mrs. Page has also sent a deceitful message that she seeks a tryst. Intrigued, Falstaff asks Quickly whether the two wives have 'acquainted each other how they love me?'. Quickly answers they certainly have not: 'That were a jest indeed!'.<sup>22</sup> Quickly's answer is controlled by her *supposition* that both wives love Falstaff rather than her belief that they are leading him on. Nevertheless, Quickly's answer is truthful. Even an accidental match with belief precludes lying.

What happens when the *asker* misspeaks? Is the meaning of the answer controlled by the inquirer's speaker meaning or by the sentence's conventional meaning? Robert DeZarn was asked whether a 1991 party was a political fundraiser. He knew the cross-examiner had intended to refer a 1990 party. Exploiting the misarticulation, DeZarn answered, 'Absolutely not'. DeZarn knew that the 1990 party was a political fundraiser. What was the content of DeZarn's answer? If the answer's content is set by the question's *conventional* meaning<sup>23</sup>, DeZarn's answer accorded with what he knew to be true. If the answer's content is set by the inquirer's *speaker* meaning (what DeZarn knew the cross-examiner to be intending to ask), then DeZarn knew his answer was false.

DeZarn was convicted of perjury. His appeal relied upon *Bronston v. United States*.<sup>24</sup> Bronston deceived a cross-examiner who asked whether he had ever had a Swiss Bank account. Bronston answered, 'The company had an account there for about six months, in Zürich'.

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<sup>22</sup> William Shakespeare *The Merry Wives of Windsor* act 2, scene 2, line 110.

<sup>23</sup> John Searle *Speech Acts* Cambridge (University Press. 1969) Chapter 2.

<sup>24</sup> 409 U.S. 352. 1973.

Bronston thereby invited the cross-examiner to infer that he did not have a personal account. But the cross-examiner failed to follow up and secure a direct answer to his question. The Supreme Court stressed that it was the cross-examiner's responsibility to ask clear questions and compel clear answers. The distinction between lying and telling misleading truths may be morally irrelevant for an ordinary conversation because one lacks the opportunity to force clarifications. But the formal context of a trial furnishes the missing opportunity. 'Caveat emptor!' applies to all perjury despite not generalizing to all commercial transactions.<sup>25</sup>

Despite the Bronston precedent, the 6<sup>th</sup> Circuit upheld DeZarn's perjury conviction.<sup>26</sup> Whereas Bronston had misleadingly failed to answer the question, DeZarn had answered.

Given that the 6<sup>th</sup> Circuit believed that speaker meaning prevails, then they are not challenging 'All perjurious statements are lies'. Their semantics would be endorsed by those who concede only a difference in degree between those who substitute an erroneous syllable ('Did you consume vine before driving?') and Reverend Spooner who repeatedly substituted 'Aristotle' for 'St. Paul' in a legendary sermon.<sup>27</sup> The cross-examiner merely mispronounced 1990 as '1991' and so did ask the correct question. Lawyers who have accents and speech impediments are entitled to accommodation by hearers. Even textualists, who call on judges to enforce the objective meaning of statutory language, make an allowance for 'scrivener's errors'.

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<sup>25</sup> Stuart Green, *Lying, Cheating, and Stealing* (OUP 2007) 154-158.

<sup>26</sup> *United States v. DeZarn* 157 F3d 1042 (6<sup>th</sup> Cir 1998).

<sup>27</sup> Elmar Unnsteinsson, 'A Gricean Theory of Malaprops' (2017) *Mind and Language* 32 458 fn 18.

Those who elevate conventional meaning over speaker meaning say that Spooner had St. Paul in mind but ended up referring to Aristotle.<sup>28</sup> They conclude that the cross-examiner had 1990 in mind but wound up referring to 1991. Instead of mispronouncing the correct question, the cross-examiner asked the wrong question. DeZarn knew his answer to that misdated question was true and therefore did not lie.

Did Robert DeZarn lie? Perhaps some prosecutors, judges, or scholars know.<sup>29</sup> But DeZarn himself does not know.

#### **4. The assertion requirement**

Lying requires *assertion* rather than a less committal speech act such as conjecturing. An asserter represents himself as knowing. His testimony is therefore offered as an opportunity for the hearer to share that knowledge. When this gift is not accepted, the speaker takes offense.

Rhetorical speakers go through the motions of asserting a proposition. In the *New York Times* headline, 'Scalia Lands at Top of Sarcasm Index of Justices. Shocking.' (Jan. 19, 2015), the Supreme Court reporter, Adam Liptak, was only making as if to assert that Justice Scalia's top score was shocking.

Many jokes avoid being lies by exploiting a grace period for assertion. Instead of immediately signaling that one is not speaking seriously, ironists delay the signal. Immanuel Kant, who rarely laughed, told stone-faced jokes to students. Kant avoided lying by operating within the statute of limitations.

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<sup>28</sup> Michael Devitt, *Designation* (Cambridge University Press 1981) 139-140.

<sup>29</sup> Green 2007, 134-139.

Well, perhaps Kant occasionally failed to cancel the assertion in time. In any such instance of tardiness, Kant lied despite not intending to lie. An economist will find it telling that Kant accepted the risk of lying. If Kant really believed that 'lying is the chief sin against others, alongside robbery, murder and stuproviolatio'<sup>30</sup> then Kant would be a man of few words. He is actually a man of three million words (just counting his corpus of publications and correspondence).

Perjury is a species of lying that always has differentia that go beyond the narrow psychology of the speaker. Mistress Quickly could be innocent of perjury because her lie inadvertently matched the truth. External developments may make Quickly's lie irrelevant and so non-perjurious. Quickly may reasonably believe her testimony to a congressional committee was perjurious but subsequently learn that the committee lacked a quorum.

## **5. Inferring insincerity from inconsistency**

Aligning what one says with what one believes increases one's overall consistency. For belief aims at truth and each truth is consistent with every other truth.

This beacon of consistency dims as the quantity of statements increases. When a consistent statement is added to a previous consistent statement, there is a single opportunity for joint inconsistency. Adding it to two previous statements introduces *three* more opportunities for inconsistency: two opportunities for a pairwise inconsistency and another opportunity for a three-

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<sup>30</sup> Immanuel Kant, *Notes and Fragments* ed. Paul Guyer, (tr.) Curtis Bowman, Paul Guyer, and Frederick Roauscher (Cambridge University Press, 2015) 19.

way inconsistency. Given  $n$  statements, the number of combinations is  $2^n - 1$ . Hence, the opportunities for inconsistency increase at a *geometric* rate. Consequently, those who accurately align assertions with beliefs eventually fall into inconsistency.

When a cross-examiner suspects an inconsistency, she may alert the witness and invite some retraction. But retraction is often infeasible at a large scale. The testifier sincerely answers each question but cannot sincerely affirm the conjunction of his answers.

Prosecutors separate perjurious inconsistency from honest inconsistency by showing that the speaker has deliberately disengaged testimony from belief. For instance, they show that testimony follows a script rather than memory. The substitute basis for testimony need not involve outsiders. In the movie *Anatomy of a Murder* (1959), the defense attorney just explains to a 'forgetful' client what sort of recovered memory would most hinder a murder conviction. The crime of persuading someone to lie under oath has never required encouragement of a specific lie – just some lie or other that is material to the case.<sup>31</sup> The Organized Crime Control Act of 1970 eliminates an arbitrary difference in specificity between perjury and subornation of perjury.

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<sup>31</sup> In American Federal Law, Title 18 U.S.C. § 1622 states, 'Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined under this title or imprisoned not more than five years, or both.' Procuring a service does not require specification of how the service is to be rendered. Subornation of perjury has the same indifference to detail as the crimes of procuring theft, kidnapping, or murder.

Critics of the 1970 reduction in the prosecutor's burden of proof worry that it fails to distinguish honest inconsistency from perjurious inconsistency.<sup>32</sup> However, ordinary practices of lie attribution suggest safeguards against prosecutorial abuse of the lightened burden of proof. These safeguards are easier to develop when prosecutors do not overestimate the specificity of the liar's knowledge of his lies.

## **6. Support for the metaphysical thesis**

Consider a bin of books. When looking down at the row of books, some may be upside down relative to the other books. But there is no intrinsic orientation. An author might worry that an exhibit of his books will suffer from this relational disorder. A lazy librarian assures him by listing each of his ten books as being right side up: *Book one is right side up, Book two to right side up, etc.* But the librarian knows that some books are upside-down relative to the other books. The lazy librarian's enumeration constitutes lying. But the librarian did not believe of any specific statement that it is a falsehood. Indeed, the lazy librarian does not understand how any of these particular statements could be false. Nor do you.

The lazy librarian believes that her *conjunction* of reports is false. But the librarian did not assert that conjunction. She resembles the author who, upon completing a book of a thousand assertions, declines to assert their conjunction.

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<sup>32</sup> Sidney DeLong, 'Testimonial Consistency: The Hobgoblin of the Federal False Declaration Statute' (1989) *Denver University Law Review* 66 135.

If the lazy librarian asserted the conjunction, then that conjunction would be a specific lie. But given that lying requires the speaker believe the negation of what she asserts, her lie would be irreducibly conjunctive. None of the conjuncts constituting the lie would be a lie.

An exasperated judge promises freedom exactly if the defendant appears the next day both naked and not naked. The defendant appears in a net. Under oath, he testifies to being naked (by virtue of wearing no clothes) and testifies to being not naked (by virtue of the net covering his body). He is charged with perjury. The prosecutor concedes that the defendant is a borderline case of 'naked'. Consequently, no one can specify a perjurious statement in his testimony. But it is equally impossible for the defendant's contradictory statements to be both true. The defendant is convicted of perjury despite the prosecutor acknowledging an absence of a specific lie.

The holistic nature of belief ensures interpretive slack in the attribution of beliefs and thereby, slack in the attributions of lies. When a teacher simultaneously lectures aloud and writes on a blackboard, there is often a divergence in meaning without one mode of expression taking priority over the other. Ditto for those who simultaneously sign and speak for the benefit of mixed audience of the deaf and hearing. The duality does not double the number of lies. The duality just reduces the specificity of the lie told.

Translation is always a matter of trade-offs. The standard for spoken discourse differs from the standard for writing (which cannot rely as organically on the speaker's gestures and speech setting). When convicting a foreign speaker of perjury, a prosecutor may concede that the testimony has several translations that are not synonymous. She need only show that there are legally relevant lies under all admissible translations.

W. V. O. Quine dramatized translational indeterminacy by imagining an anthropologist faced with the task of translating a completely unknown language (without the help of bilinguals



or a chain of bilinguals).<sup>33</sup> The verbal behavior of a native would always be compatible with rival translation manuals. For instance, a native who exclaims 'Gavagai' could be interpreted as saying 'There is a rabbit' or as saying 'There is an undetached rabbit part' or 'It is rabbiting'. If the native's report was insincere, then each translation manual agrees that the native is telling some lie. But the manuals disagree as to which lie is being told. Instead of inferring there is always some specific lie, one should allow for the possibility that there is some lie without there being any specific lie.

Quine believes the same indeterminacy extends to one's own language. Speakers invest only as much meaning as needed. An unprecedented situation, such as the defendant dressed in a net, exposes the incompleteness of 'naked'. This semantic gap does not prevent lies about borderline cases. It is indefinite whether the defendant is naked. But it is definite that he is not both naked and not naked. A patient prosecutor copes with indeterminacy by waiting for the testifier to inconsistently employ a vague predicate. She cannot specify which of the incompatible assertions is false. But she can demonstrate that they cannot be both true.

Consider a fan of *The Autocrat at the Breakfast Table*. She sincerely exclaims, 'Oliver Wendell Holmes is a Renaissance man: poet, physician and jurist!'. The fan has fused father (the physician and poet) and son (the eminent jurist). She gets carried away and claims that Oliver Wendell Holmes shouted at Abraham Lincoln to take cover during the Battle of Fort Stevens. The fan believes the story is apocryphal. Who did she lie about? The absence of a specific answer does not prevent attribution of a lie to the fan. Speakers can lie even when their confusion

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<sup>33</sup> W. V. O. Quine, *Word and Object* (M.I.T. Press, 1960).

precludes any proposition from being the specific content of their lie. The cognitive demand on lying is not so high as to confine lying to speakers who are free of linguistic errors and speech deficits. As soon as a tourist acquires enough fragmentary English to assert, he has enough English to lie.

A problem for legislators in 1970 was that a witness would often change testimony in response to threats.<sup>34</sup> The False Declaration Statute counter-threatened an easy perjury conviction. One-sided coercion raises doubt that the agent acted freely. Balanced, two-sided coercion restores choice as the best explanation of the action.

These legislators could still agree that prosecution be as specific *as feasible*. What should be done if there is no specific perjurious statement? Maximize specificity by removing any superfluous statements from the incriminating discourse. When there is a specific lie, all other statements are superfluous. In the absence of a specific lie, the prosecutor might focus on the stretch of testimony entailing an inconsistent timeline. Only that stretch is perjurious.

## **7. Why people believe lies are self-specifying**

It is often assumed in ordinary speech that lies can be exported from inside the scope of self-knowledge:

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<sup>34</sup> Delong 1989, 144. The problem persisted past 1970 and became notorious when the flamboyant John Gotti assumed control of the Gambino crime family. After one intimidated witness reversed his testimony, the front page of *The New York Post* blared 'I FORGOTTI' (March 25, 1986).

*I know that I am telling some lie.*

*Therefore, there is some lie such that I know that I am telling it.*

The intuitive validity of this present tense argument contrasts with the intuitive invalidity of a corresponding argument in the past tense. I might know I lied but now cannot recollect which lie I told. The future tense version is also intuitively invalid. I might know I will lie but not foresee which lie I will tell. Memory and foresight are not needed for knowledge of my present lies. So, negatively, the present tense argument looks valid because it is immune to the temporal difficulties that invalidate the past tense and future tense variations.

A positive case for the validity emerges from the assumption that assertion requires knowledge of which proposition one is asserting. If one knows one is asserting some lie and knows which proposition one is asserting, one has identified that lie. Consequently, if I am lying, I know which lie I am telling.

Why must a speaker know what he is asserting? A motivational answer is that a sincere speaker wants to tell only truths. Therefore, he needs to identify which proposition he is asserting to check whether it is true. Vetting is also needed if the speaker's motive is to say only what is false: 'In order to invent a lie at all, he must think he knows what is true. And in order to invent an effective lie, he must design his falsehood under the guidance of that truth.'<sup>35</sup> In contrast to the bullshitter's diffuse indifference to the truth, the liar is as focused on the details as the counterfeiter copying a hundred dollar bill.

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<sup>35</sup> Harry G. Frankfurt, *On Bullshit* (Princeton University Press, 1986) 55-56.

## 8. Specificity in proofs

Mathematical intuitionists defend exportation for *proof*. These bottom-up reasoners demand an example for any generalization. To prove an existential generalization *There exists something that is F* one must employ the inference *rule* of existential generalization: *From Individual a is F, you may infer There exists something that is F*. For the only means of warranting a generalization that something is F is by knowledge of a particular instance of F. How does one prove there is an integer equal to the sum of all integers that precede it? By showing that a specific integer, *three*, is the sum of two and one.

L. E. J. Brouwer based intuitionism on an interpretation of Immanuel Kant's philosophy of mathematics. Proof was conceived as mental construction. Brouwer earned attention from fellow mathematicians because his bottom-up proofs by example have more content than top-down proofs that lack specimens. In 1876 Édouard Lucas demonstrated that the candidate Mersenne Prime  $2^{67} - 1$  must have factors (and therefore is not a prime number). But his non-constructive proof does not specify what those factors are. In 1903, Frank Nelson Cole received a standing ovation at the American Mathematical Society by silently going to a blackboard and doing two calculations. First, he calculated the value  $2^{67} - 1$  eventually yielding 147,573,952,589,676,412,927. Then Cole moved to the opposite side of the board and got the same number by multiplying 193,707,721 and 761,838,257,287. After an hour of multiplication, Cole sat down, having said nothing. This silent performance constituted a constructive proof that  $2^{67} - 1$  is not prime. The audience understood Cole had specified the factors of  $2^{67} - 1$  that had eluded Lucas.

Despite being designed for mathematics, Brouwer's intuitionism is attractive wherever we desire all evidence to be specific. This desire is general to all adjudication. In cricket, umpires are required to call plays as they *see* them. The existential generalization, 'The batter satisfies at least one of the objective conditions for being out', is easier to know than the specific proposition, 'The batter is out because the ball tipped his bat and was caught by the catcher'. When the cricket umpire only knows the existential generalization, he is required to call the batter as not out. Many spectators believe this call is dishonest. But their scorecards reflect the specificity requirement; there is a mandatory entry for classifying the way in which the batter is out. Consequently, there would also be dishonesty in the umpire feigning perception of the ball being caught by the catcher after contacting the bat. Since the umpire must be decisive, he must choose between a lie of the form 'The batter is out because x' and the apparent lie 'The batter is not out'.<sup>36</sup> When the dilemma arose in a nationally televised game, the umpire, Asad Rauf, paused, deliberated, and eventually called the batter not out.<sup>37</sup> There was consternation among the players, fans, and the announcer. But intuitionists admired the umpire.

Legal emphasis on specific proof encourages intuitionists to expect their scruples about specificity will be respected by law enforcers. Prosecutors must single out which act violated which law. Knowledge that a defendant committed some crime or other is never sufficient basis for a guilty verdict.

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<sup>36</sup> Simon Beck, 'Intuitionism, Constructive Interpretation, and Cricket' (2008) *Philosophical Papers* 37 321.

<sup>37</sup> Ian Rumfitt, 'Ricky Ponting and the judges' (2010) *Analysis* 70.

## 9. How the classical logician avoids postulating self-deception

I once marveled aloud at the fit between legal reasoning and the specificity of intuitionist logic. A classical logician retorted with a counterexample from Scotland. After an intuitionist completed a journey between two toll plazas, he received a speeding ticket. The short travel time proved (non-constructively) that the intuitionist sped somewhere on his journey. So at least one Scottish offense violates the intuitionist's scruples about proof.

This non-constructive proof of speeding cannot be faulted as being inevitably inferior to a police officer spotting a driver speeding. Observation is often more fallible than deductions from generalities. Compare two ways of answering the question 'Are there two Scots who have the same number of hairs on their heads?'. The constructive method features a police officer who counts an equal number of hairs on distinct Scottish heads. The fallibility of such counting contrasts with the reliability of this non-constructive method: deduce an affirmative answer from the following two generalizations confirmed by encyclopedias: 'No one has more than a million head hairs' and 'There are more than a million Scots'. The probability of miscounting by the police officer is far higher than the probability of error by the encyclopedias.

Cole's 1903 constructive proof that  $M_{67}$  has the factors 193,707,721 and 761,838,257,287 would have been less convincing to an audience that did not already know that  $M_{67}$  has factors. A mental construction that takes an hour is a feat that might have been failed because of fatigue. Lucas' proof that  $M_{67}$  has factors reduced doubt that Cole miscalculated.

Non-constructive proofs are thriftier as measured by the lower amount of information they require. This frugality suggests a similar economy for the epistemology of lies. Instead of interpreting the liar as always aware of a specific lie, interpret the liar as a classical logician who

accepts demonstrations that do not build up generalizations from examples. Since these `witnesses` are supererogatory for generalizations in classical logic, there is no need to postulate self-deception. There need never have been any specific knowledge of the lie to conceal from oneself. This is an exit for those who do not understand how self-deception is possible and yet wish to claim that someone can know he is lying about something but not know which lie he is telling.

### **10. Nonspecific perception of lies**

During a symphony, one hears lyres without hearing each lyre. During a quarrel between a husband and wife, one hears lies without hearing each lie. From the coarse grain lie detection afforded by speech perception, one may sometimes home in on specific lies. But one can measure the amount of lying without measuring each lie.

To broach the topic of Biblical forgery, scholars begin by merely showing that there must be some forgery. After all, the Second Epistle to the Thessalonians warns of forged letters by Paul. This warning must be true. For either other letters are forgeries or 2 Thessalonians 2 itself is a forgery. Having non-constrictively proven that there is some amount of forgery, the scholars can focus on identifying which letters are forgeries.

A prosecutor can weigh statements as she weighs pennies; *either* individually or collectively. Knowledge that each United States penny minted after 1982 weighs 2.5 grams gives her opportunity to deduce that there are some counterfeit pennies in a bag of pennies stamped with dates after 1982. For instance, if the coins weigh 103 grams, she knows some are counterfeit pennies despite ignorance of how many pennies are weighed. She does not need to

open the bag. The presence of counterfeits can be known in the absence of knowledge of a particular counterfeit.

A chagrined librarian spots several copies of *Dewey Decimal Classification* interspersed among other books. At a glance, she has perceptual knowledge that some copies are mis-shelved. But there is no copy such that she has perceptual knowledge that it is mis-shelved. Frustratingly, the librarian knows she is viewing some mis-shelved copies but cannot identify any specific copy as mis-shelved. Her difficulty is not that some of the mis-shelved copies are hidden behind other copies.

Introspection alerts a witness to his testimony being as dis-ordered as the librarian's shelf of books. He cannot avoid perjury by keeping himself ignorant of which statements are perjurious.

Being conscious that one is lying is compatible with not being conscious of any particular lie. The lies may be in the field of vision of the mind's eye in same way mis-shelved books are in the field of vision of the librarian. Ditto for one's perjurious statements.

## **11. Dumbing down: obstacles to recognizing nonspecific lies**

Logical notation illuminates the psychological distance between lying and recognition of one's lie. 'There is a lie and Eve tells it',  $(\exists x)(x \text{ is a lie and Eve tells } x)$ , is judiciously silent on whether Eve thinks she is telling a lie. Eve could mistake her lie as a slip of the tongue. Perhaps, Eve's aversion to lying biases her against correctly identifying her own statements as lies.

Normal aversion to lying is magnified by ethical systems – often with distorted effects. In Lectures on Ethics, Immanuel Kant denies that you lie when telling defensive falsehoods to a liar



or a ruffian.<sup>38</sup> For they lack a rational expectation that you will tell what is true. More surprisingly, if you announce that what you say as true, then the defensive falsehoods are lies! Repeating your falsehoods under oath is worse because your sworn statements are lies, while the original statements were not lies. Kant is remarkably reluctant to count negotiators as lying when they tell falsehoods. He portrays politeness as a non-deceptive illusion and so paid insincere compliments to hosts of dinner parties. White lies, for Kant, parallel white chocolates (which are not really chocolates). Those who reject this analogy say that Kant mistook his insincere compliments as non-lies. Kant's ethics crippled his epistemology. His subscription to 'All lies are gravely wrong' leads him to override evidence of lying afforded by linguistic clues such as 'white *lie*'). Kant's absolutism dulls his sensitivity to introspective clues such as the duping delight Kant took in deceiving King Friedrich Wilhelm II. Kant promised the King, 'as your Majesty's loyal subject'<sup>39</sup>, to abstain from all writing and lecturing on religious subjects. As Kant intended, the King heard the promised abstinence as applying for Kant's lifetime rather than the

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<sup>38</sup> Immanuel Kant, (1997) *Lectures on Ethics*, P. Heath (tr.), P. Heath and J. B. Schneewind (eds.), (Cambridge University Press 1997) 227, 229.

<sup>39</sup> Kant, Immanuel (1798) *The conflict of the faculties*. In: A. W. Wood and G. di Giovanni eds. *Religion and Rational Theology in The Cambridge Edition of the Works of Immanuel Kant*. (Cambridge University Press; 1996) 233-328. (AK 1798, 7:10). Roy Sorensen and Ian Proops argue that this was a lying promise in 'Kant and the king: Lying promises, conventional implicature, and hypocrisy' *Ratio* (forthcoming). They specify other lies, many relevant to the interpretation of the *Critique of Pure Reason*, 'Destigmatizing the Exegetical Attribution of Lies: The Case of Kant' (2023) *Pacific Philosophical Quarterly* 104 746.

King's. When the King predeceased him, Kant published the forbidden manuscript in his desk drawer.

Experimental psychologists, who routinely lie to experimental subjects, feel no need to side-step Kant's absolute prohibition of lies by creative re-classification of lies as non-lies. They just lie and are done with the matter. Attributing lies to these relaxed speakers is straightforward. For there is convergence between how we commentators report the lie and how the relaxed speakers would report it. When the same lie is told by an absolutist who falsely believes his statements are not lies, narrators must be careful not to suggest that the absolutist would agree with their lie attribution.

## **12. Smartening up: statistical awareness of one's nonspecific lies**

My main theme is that nonspecific lying appropriately dumbs down the epistemology of lying. I can know I am lying about something without inferring this generalization from knowledge of any particular lie. I may be insensitive to the particular lie I am telling but still sensitive to the fact that I am telling some lie. More starkly, there may be no specific lie to which I could be sensitive. To balance this de-intellectualizing theme, let us turn to the intellectual opportunities introduced by nonspecific lying.

A minority of people know that there are migraine headaches by experiencing one. These unfortunate people have knowledge *by acquaintance*. The fortunate majority only know *by description* that there are migraine headaches. Purely statistical self-knowledge of lying is not knowledge by acquaintance. Consequently, statistical self-attribution of a lie does not entail there is a lie.

The accuracy of statistical beliefs about one's own lying improves with practice. Some of the improvement is just the removal of misleading evidence. After one becomes accustomed to public speaking, anxiety dissipates. The discomfort is no longer present to be misclassified as shame. With practice, prepared public speech is experienced as sincere rather than insincere. Thanks to rehearsal and vetting, the speaker diligently aligns what he asserts with what he believes.

Some of the improvement in actuarial lie detection accrues from formal training. Randomized response design is particularly germane. Fischbacher and Föllmi-Heusi had subjects report on the results of a privately rolled die for which the pay-offs (in Swiss Francs) matched the number on the die – except for 6 which received a 0 pay-off.<sup>40</sup> The reported pay-off percentages: 0 = 6.4%, 1 = 7.2%, 2 = 11.6%, 3 = 12.6%, 4 = 27.2%, 5 = 35%. By a design salient to all, the subjects knew that the experimenters had only nonspecific knowledge of lying.

Speakers assess their own veracity with the same principles that they apply to other people. Some of these generalizations only warrant a nonspecific attribution. The self-suspicious speaker may then try to fine tune knowledge that 'I am lying about something' by singling out a lie that makes the generalization true (or better yet, a lie that best explains the initial, nonspecific knowledge of lying). Success in this inquiry would not entail that the self-investigator knew the identity of the lie all along. The hindsight illusion misleads us into thinking past nonspecific knowledge of lying was based on knowledge of a specific lie.

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<sup>40</sup> Ur Fischbacher and Franziska Föllmi-Heusi, 'Lies in Disguise—An Experimental Study on Cheating' (2013) *Journal of the European Economic Association* 11 525.

### **13. Ignorance about whether you are lying**

If lying always required knowledge that one is lying, then ignorance of whether one is lying would enable one to conclude that one is not lying. But knowing you are ignorant of whether you are lying does not resolve into knowledge that one is not lying. Illustration: Does checking a box on your computer screen for 'I have read the service contract' constitute a lie? People who know they do not know the answer to this question are not poised to exploit this ignorance and conclude that the answer is no. Difficult cases are not made easy by their difficulty.

Some testifiers prefer not to know whether they are lying. One tactic is to take cover in twilight. Tell a borderline lie rather than a clear lie. This is a tactical success for each lie. Considered piecemeal, 'My  $n$ -th assertion is a lie' has plausible deniability for each  $n$ . But plausible deniability does not agglomerate. For a large  $n$ , one cannot plausibly deny 'For some  $n$ , the  $n$ -th assertion is a lie'. Ignorance of whether any particular borderline case is a lie is compatible with knowledge that some borderline case or other is a lie.

Most borderline cases are only unknowable relative to ordinary means of inquiry. Prosecutors marshal extraordinary resources that solve mysteries about who is lying. These resources often exceed what is available to the witness' introspection. Public evidence sometimes overrides private evidence that one is not lying. If a busy barista miscalls Grandfather Jon's beverage as 'Jan's', Jon will feel honest when he announces, 'I am Jan!'. Jon will be shocked when his frank daughter compliments him on his polite lie. The tension Jon feels when telling selfish lies is absent when he tells altruistic lies. He misinterprets his absence of tension as sincerity.

*Absolute* borderline cases permit the construction of universal generalizations that cannot be refuted with a knowable counterexample. Consider a classical logician who believes a bag she lifted weighed somewhat more than 10 kilograms. She is urged to testify that the bag weighed over 20 kilograms:

1. Base step: Testifying that the bag weighed over 10 kilograms would not be a lie.
2. Induction step: If testifying that the bag weighed over  $n$  kilograms would not be a lie, nor would testifying that the bag weighed over  $n + 1$  kilograms.
3. Conclusion: Testifying that the bag weighed over 20 kilograms would not be a lie.

The classical logician concedes the argument is valid. Since the first premise is true and conclusion is false, the induction step must be false. The negation of that universal generalization is equivalent to the existential generalization that there is some  $n$  at which testifying the bag weighed over  $n$  kilograms is not a lie but testifying the bag weighs over  $n + 1$  kilograms is a lie. There is no knowable instance of this existential generalization. But the classical logician allows for non-constructive proof and so affirms there is a hidden threshold at which the lies commence. The classical logician concludes that some lies are *absolutely* unknowable.

'Perjury' inherits the vagueness of 'lie'. In addition to being difficult to prove for empirical reasons, perjury can also be difficult to prove for conceptual reasons. Consequently, there will be testimony that has no clearly perjurious statement but which clearly has perjurious statements. In these cases, constructive proof of perjury is impossible. Thanks to the 1970 reform permitting non-constructive proof of perjury, the prosecutor could concede the impossibility of demonstrating any specific statement as perjurious and yet still prove perjury.

Since the impossibility of a constructive proof would apply to everyone, the perjurer himself would have only nonspecific knowledge of his perjury. Indeed, he may first learn of his perjury from the prosecutor.

The speech act of assertion is consummated simply by going on the record. The role of 'hereby', in 'I hereby assert the bag weighed over 20 kilograms', is to officially commit the speaker to the truth of her testimony by having the speaker herself characterize the nature of her speech act as assertion.

#### **14. Culpability with only nonspecific self-knowledge of perjury**

Testifiers have varying degrees of culpability for their falsehoods. At the innocent extreme is the author who realizes that mistakes must have crept into his text despite careful scholarship. The author apologizes in the preface for the mistakes. However, the same preface expresses hope of completing volume two - despite the same statistical inevitability of error. There is regret without remorse. The author resembles a diligent builder of a bridge who foresees injuries and deaths but is not thereby guilty of manslaughter or murder. Both morality and law treat statistical knowledge of harm more leniently than individualized knowledge.<sup>41</sup>

*Willing* ignorance erases some of the difference.<sup>42</sup> A builder who avoids learning onerous safety regulations is as culpable as a builder who wittingly violates them. Ignoring safety

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<sup>41</sup> Kenneth L. Simons, 'Statistical Knowledge Deconstructed' (2012) *B.U. L. Rev.* 92 1.

<sup>42</sup> Alexander Sarch, *Criminally Ignorant: Why the law pretends we know what we don't* (OUP 2019) 12.

protocols is reckless. The absent-minded builder who proceeds without regard for safety is negligent. All of these nuances of culpability apply to testifiers.

A smuggler has a special duty to check whether an easily opened bag contains dangerous contents. But he may lack the means to research whether the contents are dangerous. An author of a medical textbook knows how to investigate whether the therapies are safe. Authors of scholarly books are especially well-qualified candidates for a duty to inform oneself.

Blameworthiness for false testimony is also mitigated by consent. Medical historians announce they will use false names and confound circumstances to protect the privacy of patients.<sup>43</sup> These testifiers have individualized knowledge of their lies. They seek immunity from blame by issuing a nonspecific warning. Arguably, readers who continue beyond the disclosure thereby consent to be lied to. Some of them believe that the patient's right to privacy *obliges* the author to lie to readers. Instead of providing an excuse for lying, these readers feel the author has justified lying to them. Consent induces lenience even when there is no moral pressure to lie. To vindicate the title of *Astonishing Animals*, the paleontologist Tim Flannery warns in his preface that one of the animals he depicts does not exist – and dares the reader to discover which!<sup>44</sup>

When lies are rare, we presuppose sincerity. For belief is the best explanation of why the assertion was voiced. When lies are common, there are equally good alternative hypotheses.

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<sup>43</sup> Siddhartha Mukherjee, *The Emperor of All Maladies: A Biography of Cancer* (Scribner, 2010) xiv.

<sup>44</sup> Timothy Flannery and Peter Schouten *Astonishing Animals* (Atlantic Monthly Press, 2004) xvii.

Consequently, a process of elimination is needed to verify alignment between what is said and what is believed. The base rate of lying is also relevant to self-awareness of one's own lying. When a speaker's vigilance is relaxed, loose talk shades into borderline lying. Before you know it, you are lying.

If such careless testimony takes place under oath, the speaker may realize that his testimony contains some perjurious statements. Statistical lies that creep in by reckless or negligent testimony may be less culpable than a lie known as such by the speaker.<sup>45</sup> But statistical lies still constitute lying under oath.

The cross-examiner often discovers the identities of statistical lies. But sometimes there is no specific lie. Instead, the perjury arises jointly from many statements none of which is intrinsically perjurious. The statements are akin to a jig-saw puzzle that has too many pieces. No piece is defective. The defect is collective. One displays the pieces and shows how they cannot fit together exhaustively. The prosecutor shows that the statements under oath are jointly inconsistent. She can concede that each statement is consistent and is not perjurious. The statements are jointly perjurious.

## **15. Generalizing nonspecific lying**

Gregory Klass argues that the law of deception is a natural legal kind: one encounters similar problems of design, function, and justification throughout the category. [With the exception of] Richard Craswell, legal scholars have considered only this or that species, ignoring the genus as

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<sup>45</sup> Douglas N. Husak, *Ignorance of Law: A Philosophical Inquiry* (OUP 2016) chapter 3.



a whole.’<sup>46</sup> Instead of deception, this essay has focused on one species of criminal lying. The key phenomenon, nonspecific lying, is at the level of genus. As a result, my philosophical defense positions the Organized Crime Control Act of 1970 generalizes to other species of criminal lying.

Consider a proffer in which a defendant speaks ‘off the record’ to a prosecutor about what he would testify. If the prosecutor discovers the defendant is inconsistent during the interview, she can void the agreement and charge him with obstruction of justice. The crime of making false statements strongly resembles perjury.<sup>47</sup> Although not under oath, the speaker has lied under the jurisdiction of a government agency. In the case of impersonation, someone ‘knowingly misrepresents his or her actual name, date of birth, or address to a police officer’ to prevent the officer from ascertaining such information.<sup>48</sup>

Fraud also resembles perjury but not as closely as the crime of false statements. Fraud is deception to cheat victims of money, goods, or services. Although some of the deception is accomplished by lies, deception can also be accomplished by misleading truths, ‘deceptive conduct, gestures, pictures, even silences’.<sup>49</sup> Fraud falls within Klass’ fluid realm of deception rather than the rigid realm of lies.

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<sup>46</sup> Gregory Klass, ‘Meaning, purpose, and cause in the law of deception’ (2011) *Geo. LJ*, 100 450.

<sup>47</sup> The crime is principally codified in 18 USC § 1001. Stuart Green elaborates the resemblance in chapter 14 of *Lying, Cheating, and Stealing*.

<sup>48</sup> New York Penal Law §190.23.

<sup>49</sup>Green 2007, 160.

Fraud can also be a tort. This duality between public wrong and private wrong invites generalization to other lies that are solely torts. Misrepresentation is a false statement that the victim relies upon to her detriment. False pretenses concern an intentional false representation designed to cause to the victim to pass title of his property. And lastly there is the tort of defamation: issuance of a falsehood that results in another party suffering harm.

These species of illegal lying have differentia that affect the burden of proof. For some species, one might insist that a specific lie be identified. My point is that there is a choice to be made.