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12-4-2009

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### Recommended Citation

Scott T. FitzGibbon. "Just Like Little Dogs": The Law Should Speak with Veracity and Respect.' In *The Jurisprudence of Marriage and Other Intimate Relationships*. Ed. Scott FitzGibbon, Lynn D. Wardle, and A. Scott Loveless. Buffalo, NY: William S. Hein Co., 2010: 107-141.

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“JUST LIKE LITTLE DOGS”:

THE LAW SHOULD SPEAK WITH VERACITY AND RESPECT

By Scott FitzGibbon<sup>1</sup>

“So we walked along the sands towards the dunes,” Tom said, “and [my brother] Walter was with Doris and I was with Norma. Norma worked in the steam laundry. We hadn’t been walking and talking for more than a few minutes when, by God, I knew I was head over heels in love with the girl, and she wasn’t the pretty one, either.”

He described her. I saw her clearly. Her plump, kind face, jolly brown eyes, warm wide mouth, thick bobbed hair . . . .

“Doris was the pretty one,” said Tom, “smart and touched up and sharp as a knife. I was twenty-six years old and I’d never been in love, and there I was, gawking at Norma in the middle of Tawe sands, too frightened to put my finger on her gloves. Walter had his arm round Doris then.”

They sheltered behind a dune. The night dropped down on them quickly. Walter was a caution with Doris, hugging and larking, and Tom sat close to Norma, brave enough to hold her hand and tell her all his secrets. He told her his age and his job. He liked staying in in the evenings with a good book. . . . Norma and Doris were sisters. . . .

Now the story-telling . . . gave place to the loving night in the dunes. . . . {Tom’s hands were] on Norma’s breast. “Don’t you dare!” Walter and Doris lay quietly near them. You could have heard a safety pin fall.

““And the curious thing was,” said Tom, “that after a time we all sat up on the sand and smiled at each other. And we all moved softly about on the sand in the dark, without saying a word. And Doris was lying with me, and Norma was with Walter.”

“But why did you change over, if you loved her?” I asked. “I never understood why,” said Tom. “I think about it every night.” . . . . And Tom continued: “We didn’t see much of the girls until July. I couldn’t face Norma. Then they brought two paternity orders against us, and Mr. Lewis, the magistrate, was eighty years old, and stone deaf,

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too. He put a little trumpet by his ear and Norma and Doris gave evidence. Then we gave evidence, and he couldn't decide whose was which.

"And at the end he shook his head back and fore and pointed his trumpet and said: 'Just like little dogs!'"

All at once I remembered how cold it was. I rubbed my numb hands together. . . . "What happened then?" I asked. Walter answered. "I married Norma," he said "and Tom married Doris. We had to do the right thing by them, didn't we? That's why Tom won't go home. He never goes home till the early morning. I've got to keep him company. He's my brother."

-- Dylan Thomas, *Just Like Little Dogs*.<sup>2</sup>

"[S]pouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited.

-- Ontario Family Law Act<sup>3</sup>

The ordinances of the Lord are true.

-- Psalm 19<sup>4</sup>

## I. INTRODUCTION.

This article proposes veracity and respect as basic guides for law. It thus supplements dominant lines of thought which emphasize instrumentalist criteria<sup>5</sup> such as promoting efficiency, maximizing utility, and deterring and remedying harm.

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<sup>2</sup> In DYLAN THOMAS, *THE COLLECTED STORIES* 174, 178-79 (1938). In the original, some of the paragraphing is different than as here quoted.

<sup>3</sup> R.S.O. 1990, c. F-3, s. 29. This definition is discussed in Part V of this Article.

<sup>4</sup> Psalm 19:9, *THE NEW OXFORD ANNOTATED BIBLE: NEW REVISED STANDARD VERSION WITH THE APOCRYPHA* (3d ed. 1995). Compare Psalm 19:10, *TANAKH: THE HOLY SCRIPTURES: THE NEW JPS TRANSLATION ACCORDING TO THE TRADITIONAL HEBREW TEXT* 1126 (Jewish Publications Society, 1985): "the judgments of the LORD are true."

<sup>5</sup> See Brian Z. Tamanaha, "The Perils of Pervasive Legal Instrumentalism," *Montesquieu Lecture Series, Tilburg University*, Vol. 1, 2005 (available at SSRN: <http://ssrn.com/abstract=725582>) (abstract):

This article proposes that it is a great good for a judge, a legislator, and all who speak as the law to exercise the virtue of veracity and to speak with respect, and that it is especially bad in the case of such legal officers to depart from those practices.<sup>6</sup> It points out some implications for family law.

A. *Mendacity: Some Reflections.*

This century of horrors from which we have just exited experienced, it has been said, a crisis of solidarity:<sup>7</sup> a “great disruption” which “weakened the bonds holding families, neighborhoods, and nations together.”<sup>8</sup> More fundamentally, the Twentieth Century bought with it severe crises of political and social truthfulness. It endured sustained assaults on the practices of veracity. It witnessed the determined propagation of comprehensive systems of false belief.

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“In contemporary U.S. legal culture, the law is widely seen as an instrument to serve ends. Many legal theories construe law in instrumental terms (law is an instrument to maximize wealth, law is an instrument of male patriarchy, etc.). Law professors indoctrinate students to reason instrumentally using legal rules and policy arguments. . . . Judges increasingly engage in instrumental analysis when deciding cases. . . . Legislation and administrative regulations are seen as empty vessels that can be filled in and applied to achieve whatever ends might be desired.”

See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

<sup>6</sup> This Article does not enter the ancient debate about whether in some extreme circumstances – to avoid some severe harm – lying may be justified. (None of the instances of mendacity here considered involved harm avoidance of that sort.). Relevant authorities on this debate may be accessed through Christopher Tollefsen, *Intending Damage to Basic Goods*, 14 *CHRISTIAN BIOETHICS* 272 (2008).

<sup>7</sup> John Paul II, “Instrumentum Laboris for the Synod of Bishops -- Second Special Assembly for Europe,” in *L’Osservatore Romano*, Weekly Edition in English, November 18, 1999. See John Paul II, “Message to Prof. Sergio Zaninalli, Rector Magnificent of the Catholic University of the Sacred Heart,” May 24, 2000, in *L’Osservatore Romano*, Weekly Edition in English, May 24, 2000 at 9 (“The value of solidarity is in crisis.”).

<sup>8</sup> FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 5-6 (1999).

French sociologists identify a syndrome they call “Bovaryism” (after Emma in *Madame Bovary*): “the tendency to see oneself as other than one is, and to bend one’s vision of other persons and things to suit this willed metamorphosis.”<sup>9</sup> Jung Chang in her book *Wild Swans: Three Daughters of China*, described the Great Leap Forward period as having been “a time when telling fantasies to oneself as well as others, and believing them, was practiced to an incredible degree.”

“Peasants moved crops from several plots of land to one plot to show party officials that they had produced a miracle harvest. \* \* \* Although these crops generally died within a few days because of untimely transportation and harmful density, the visitors did not know that, or did not want to know. A large part of the population was swept into this confused, crazy world. ‘Self-deception while deceiving others’ . . . . gripped the nation. Many people – including agricultural scientists and senior Party leaders – said they saw the miracles themselves. Those who failed to match other peoples’ fantastic claims began to doubt and blame themselves. \* \* \* [T]hey were now facing a nationwide tidal wave of fervor which promised to swamp any individual coolheadedness. It was easy to start ignoring reality and simply put one’s faith in Mao. To go along with the frenzy was by far the easiest course. \* \* \*

“Trucks used to turn up at our compound carrying grinning peasants coming in to report on some fantastic, record-breaking achievement. One day it was a monster cucumber half as long as the truck. Another time it was a tomato carried with difficulty by two children.”<sup>10</sup>

What may induce such delusionary episodes? In some instances, the answer must be envy and shame. Like Emma Bovary, chafing under the tedious routines of daily life, some people imagine themselves to be exiled members of an elegant aristocracy. Like the Haitian elite (according to one of Haiti’s leading writers), some subjugated peoples succumb to a “*Bovaryisme collectif*” which leads

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<sup>9</sup> Deborah Jenson, “Bovaryism and Exoticism,” in COLUMBIA HISTORY OF TWENTIETH-CENTURY FRENCH THOUGHT 167 (Lawrence D. Kristman & Brian J. Reilly, eds., 2006), available at [http://books.google.com/books?id=eI166m13q70C&pg=PA167&lpg=PA167&dq=law+of++bovaryism&source=web&ots=R1KyCGGopt&sig=wZCH33YU-ysioBt55NMOxklkey0&hl=en&sa=X&oi=book\\_result&resnum=3&ct=result#PPA167,M1](http://books.google.com/books?id=eI166m13q70C&pg=PA167&lpg=PA167&dq=law+of++bovaryism&source=web&ots=R1KyCGGopt&sig=wZCH33YU-ysioBt55NMOxklkey0&hl=en&sa=X&oi=book_result&resnum=3&ct=result#PPA167,M1) (accessed July 28, 2008).

<sup>10</sup> JUNG CHANG, WILD SWANS: THREE DAUGHTERS OF CHINA 224-25 (1991).

them to live, speak, and think as though they inhabited the cultural world of the foreign colonizer.<sup>11</sup>

In other instances, the disorder may arise from a kind of stupidity. Like many weak-minded individuals in all ages, some people – not a few in our own era -- suffer from blurriness of vision and flaccidity of judgment. They exhibit an inability to discern the world clearly and an unwillingness to credit the fundamental associations of human society with significant rootedness or traction. All things appear – all things are judged to be – trivial and transient. Reflecting his experiences with Nazism, the Austrian writer Heimito von Doderer observes:

“That man becomes a revolutionary . . . who from the beginning perceives realities too vaguely because of his own poor eyesight. For that reason realities lead in his mind the wretched, degenerate, unsubstantial existence of trivial facts. Thus none of them are for him definitive, none are unchangeable, none cannot be removed from their place, none are the expressions of permanent laws . . . .”<sup>12</sup>

In such a person’s mind, even the most basic political and familial affiliations are trivialized or instrumentalized. True friendship, authentic political loyalties, and sound family structures require understanding and good judgment. For afflicted persons, “all such normalities are parched and dead within them.”<sup>13</sup> They substitute a delusionary universe for the real one in which they have lost their footing. They establish, in the place which could have been occupied with marriage, friendship, and other solidarities, a set of alliances for the propagation of delusion.<sup>14</sup>

In some instances, delusionary thinking may be the wages of pride; of an impatience with the ambiguities of a complex world and an unwillingness to abide its uncertainties; of a longing to become the author rather than a mere

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<sup>11</sup> Haiti, or the Haitian elite, is described this way in PRICE-MARS, AINSI PARLA L’ONCLE (1928) (SO SPOKE THE UNCLE) (Magdaline W. Shannon, trans., 1983).

<sup>12</sup> I HEIMITO VON DODERER, THE DEMONS 493 (Richard & Clara Winston, trans., 1961) (a translation of DIE DÄMONEN (1956)). (These statements, and others quoted in this Article, are made by one of the characters in this novel.)

<sup>13</sup> *Id.* at 492.

<sup>14</sup> *See id.* at 491, quoted in text at note 77, *infra*.

reader of the book of life. Some people desire to dominate phenomena rather than quietly to await their unfolding. Some, as Eric Voegelin observed, “lust for massively possessive experience.” Unwilling to remain in a state of wonder -- “trembling on the verge of a certainty”<sup>15</sup> -- they flee “from uncertain truth into certain untruth.”<sup>16</sup>

In some people’s minds, an “exuberance of the ego” projects experiential phenomena into a dominant position.<sup>17</sup> Manifestations of external *realia* become obscured, in their consciousness, by projections of their own attitudes and feelings. Social institutions, affiliations, and moral determinations come to be perceived as epiphenomena of *phobias* and attractions and other such affective conditions.

Such delusionary projects take on a special virulence when they involve perception and thought about the person himself. (We might call such a condition that of “reflexive delusion.”). Bovaryism involves reflexive delusion (imagining oneself to be an aristocrat or a Haitian French colonizer). Stupidity usually induces reflexive ignorance and often reflexive delusion, since accurate and realistic self-knowledge demands a considerable degree of intelligence. Pride distorts self-understanding, promoting a perfected self-image.

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<sup>15</sup> ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS* 122 (1952):

“The life of the soul in openness toward God, the waiting, the periods of aridity and dullness, guilt and despondency, contrition and repentance, forsakenness and hope against hope, the silent stirrings of love and grace, trembling on the verge of a certainty which if gained is loss — the very lightness of this fabric may prove too heavy a burden for men who lust for massively possessive experience.”

(Voegelin is here writing about wonder and certainty about religious matters.).

<sup>16</sup> ERIC VOEGELIN, *SCIENCE, POLITICS, AND GNOSTICISM* 83 (2004).

<sup>17</sup> *Cf.* ERIC VOEGELIN, *AUTOBIOGRAPHICAL REFLECTIONS* 94 (rev. ed. Ellis Sandoz, ed., 2006) (volume 34 of *THE COLLECTED WORKS OF ERIC VOEGELIN*) (“[I]n recent years [I have] developed the concept of the egophanic revolt, in order to designate the concentration on the epiphany of the ego as the fundamental experience that eclipses the epiphany of God in the structure of Classic and Christian consciousness. \* \* \* The term egophanic revolt, [distinguishes the] experience of the exuberant ego from the experience of the theophanic constitution of humanity . . .”).

Delusions may always be difficult to sustain; but this is especially so in the case of reflexive delusion. The true self is always close at hand, shadowing the delusion. The reflexive delusionist is vulnerable to disquiet and shame.

Some embittered characters storm out of the real world in a rage born of self-hatred and resentment. Adolph Hitler “deliberately chose to whip himself into a state of histrionic anger until he was quite willing to believe what he also knew to be false.”<sup>18</sup> Von Doderer observes that a revolutionary is “someone who wants to change the general situation because of the impossibility or untenability of his own position,” or rather someone who wishes, for such reasons, to alter “the fundamentals of life in general.”<sup>19</sup>

“A person who has been unable to endure himself becomes a revolutionary; then it is others who have to endure him. The abandoned, highly concrete task of his own life, with which he has been unable to cope in a personal and individual fashion, has of course to be consigned to oblivion, and along with it the capacity for remembering in general . . . .”<sup>20</sup>

These are episodes, not of simple ignorance, but of a “deliberate desire not to understand.”<sup>21</sup>

An entire regime may descend down similar paths, promulgating a false version of history, a distorted system of political morality, and a falsified heroic account of its own origins, ascent to power, and conduct in office. It may “carr[y] out a systematic falsification of history,”<sup>22</sup> going so far as to construct a “second

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<sup>18</sup> BARRY COOPER, *NEW POLITICAL RELIGIONS, OR AN ANALYSIS OF MODERN TERRORISM* 44 (2005), *citing* ERIC VOEGELIN, *HITLER AND THE GERMANS* 150-51 (2003).

<sup>19</sup> I HEIMITO VON DODERER, *THE DEMONS* 491 (Richard & Clara Winston, trans., 1961).

<sup>20</sup> *Id.*

<sup>21</sup> ERIC VOEGELIN, *HITLER AND THE GERMANS* 255 (2003)(characterizing the views of von Doderer).

<sup>22</sup> *Id.* (characterizing the views of von Doderer). *Compare* KATHERINE VERDERY, *NATIONAL IDEOLOGY UNDER SOCIALISM: IDENTITY AND CULTURAL POLITICS IN CEAUSESCU’S ROMANIA* 167-214 (1991) (describing “protochronism,” the widespread assertion that major accomplishments in European society and culture were first achieved by Romanians.).



reality.”<sup>23</sup> Von Doderer referred to the creation of “pseudological spaces” – “completely false, but comprehensible and all encompassing images of life.”<sup>24</sup>

Systematic political mendacity tends to discredit the thoughtful man and celebrate the brutish or the self-indulgent.<sup>25</sup> It leads on, even, to the devaluation of the *virtues* of thoughtfulness, such as circumspection and deliberation in arriving at conclusions and clarity and precision in formulating them. It may propose that such virtues are unnecessary and lead only to weakness and confusion; that the life of the mind as it ought to be lived involves the energetic propagation of a limited number of simple concepts and insights, endorsed more for their salutary emotional and political effects than for any philosophical merits. (We might call this sort of thing “epistemological mendacity,” since it involves the distortion not only of conclusions but also of the procedures for reaching them.). Some officials during the Nazi regime seemed almost to organize the activities of the mind as aspects of military training or even as exercises in calisthenics.<sup>26</sup>

(Some contemporary writers, in a very different vein, seem to understand the life of the mind as an epiphenomenon of the emotions. This extensive cultural phenomenon is reflected in the migration of vocabulary, in which some words, such as “happiness,” “love” and “prejudice,” today seem to refer almost entirely to experiential states rather than to objective conditions. The phenomenon is

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<sup>23</sup> ERIC VOEGELIN, *HITLER AND THE GERMANS* 255 (2003)(characterizing the views of von Doderer.).

<sup>24</sup> As quoted in DAVID S. LUFT, *EROS AND INWARDNESS IN VIENNA: WEININGER, MUSIL, DODERER* (2003).

<sup>25</sup> See II ADOLPH HITLER, *MEIN KAMPF* chapter 2 *passim* (1926), deploring the practice of schools’ “cramming” knowledge into students, and commending instead programs of thorough physical training and the development of character traits such as the ability to withstand “pain and injury.”

<sup>26</sup> See SANFORD L. SEGAL, *MATHEMATICIANS UNDER THE NAZIS* 219 (2003), quoting Gerhard Thomsen, “Über die Gefahr der Zurückdrängung der Exakten Naturwissenschaften an der Schulen und Hochschulen,” *Neue Jahrbü cher für Wissenschaft und Jugendbildung* 164, 169 (1934):

“I consider that one of the most important tasks of National Socialist education of the people is training intellectual (geistiger) concentration and one should begin with this, naturally besides physical education . . . \* \* \* [H]e who does not have intellectual concentration must be educated thereto with the same reckless and almost brutal energy with which today’s German will be educated to other things which lie in the interest of the fatherland.”

reflected, also, in the acceptance or rejection of arguments in philosophical discourse based on how they make people feel. As with the objection that a line of argument is “offensive.”).

Systematic political mendacity often involves the distortion of language. George Orwell in *Nineteen Eighty-Four*<sup>27</sup> described a regime which went so far as to propound a new version of English, with a different vocabulary and a simplified syntax designed to render critical discourse difficult or even impossible (and thence, to vitiate critical thought itself). Something like this occurred during the Chinese Cultural Revolution :

“The whole nation slid into doublespeak. Words became divorced from reality, responsibility, and people’s real thoughts. Lies were told with ease because words had lost their meanings – and had ceased to be taken seriously by others.”<sup>28</sup>

There is no reason to suppose that such developments ensue only in the aftermath of revolutions. Bovaryism, restless discontent, the parching of basic human relationships, desire for certainty, hunger for domination, and deterioration of self-esteem may afflict established authorities as well as insurgent ones. Even political orders of long standing may experience -- perhaps even for extended periods of time -- diminution of clarity of thought, loss of conceptual traction, and descent into states of mental disengagement, slipping into an unquiet dreaminess which dims discernment and occludes firmness of judgment.<sup>29</sup>

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<sup>27</sup> (1949) (Random House ed., 1992).

<sup>28</sup> JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 225 (1991). For an account of Mao’s suppression of irony, see section III B of this Article.

<sup>29</sup> For discussions of such developments as social (not specifically political) phenomena, see Scott FitzGibbon, *The Seduction of Lydia Bennet and the Jurisprudence of the Juristic Society*, in *FAMILY LAW: BALANCING INTERESTS AND PURSUING PRIORITIES* 64 (Lynn D. Wardle & Camille S. Williams, eds., 2007); Scott FitzGibbon, *A City Without Duty, Fault or Shame*, in *RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (Robin Fretwell Wilson, ed., Cambridge University Press, 2006).

B. *Disrespect: Some Reflections.*

The horrors of the Twentieth Century were marked by systematic episodes of intense disrespect. Bovaryism finds its roots in a disrespect for things as they actually are and a disdain for ordinary people, established conventions, and the regularities of every day life. Emma Bovary disrespected her husband.<sup>30</sup> Flaubert displayed through her and her surroundings his comprehensive contempt for the world in general.<sup>31</sup>

Revolutionary contempt for “bourgeois society” is well known, and has often extended to an attitude of derogation towards almost all customary attitudes and conventional practices. Arrogance and disgust were recurrent features of Nazi “skinhead” culture. Their smell permeated Hitler’s speeches, which exuded contempt not only for Jews and other obvious enemies but also for a remarkable range of other targets: social democrats, slavs,<sup>32</sup> and artists who painted meadows blue and skies yellow.<sup>33</sup> The Maoist leadership encouraged, and the Red Guards implemented, a policy of contempt for those things which had once been most respected in China: “the four olds”: “old concepts, culture,

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<sup>30</sup> Thus, she thinks:

“Charles’s conversation was as flat as any pavement, and everybody’s ideas plodded along it, garbed in pedestrian style, inspiring no emotion, no laughter, no reverie. . . . He did not know how to swim, or fence, or shoot a gun, and he was unable, one day, to explain to her a term in riding that she had come across in a book. But a man, surely, should know everything . . . .”

GUSTAVE FLAUBERT, *MADAME BOVARY* 38 (Margaret Mauldon trans. , 2004).

<sup>31</sup> See STEPHEN HEATH, *GUSTAVE FLAUBERT, MADAME BOVARY* 30 (1999):

“Flaubert’s constant words during the writing of *Madame Bovary* are ‘stupid,’ ‘fetid’ – ‘the foulness makes me sick’ – which apply both to the subject of the book he is writing and to the world around him, these being one and the same; one bourgeois reality from world to book and back again.”

<sup>32</sup> See Gerhard Masur, *Vienna and the Young Hitler*, 329 *ANNALS AM. ACAD. POL. & SOC. SCIENCE* 172 (1960).

<sup>33</sup> GEORGE LACHMAN MOSSE, *NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH* 15 (2003)(Hitler: “there really are men who on principle feel meadows to be blue, the heaven green, clouds sulphur-yellow.”).

customs, and habits.”<sup>34</sup> Even old working-class practices were attacked.<sup>35</sup> Respectful customs, such as saying “thank you,” came in for criticism.<sup>36</sup> Some attest that Russian communist leadership was contemptuous even of the workers. In the novel *Nineteen Eighty-Four*, the regime disrespects love itself and other normal human sentiments. (“The terrible thing that the Party had done was to persuade you that . . . mere feelings, were of no account . . . .”)<sup>37</sup> and some of its apparatchiks despise even the proletariat. (One of Winston’s colleagues in the Ministry of Truth states: “the proles are not human beings.”)<sup>38</sup> Marxist theorists have proposed that “any society which needs the concept of respect is fundamentally defective.”<sup>39</sup>

Modern Western societies seldom manifest comprehensive contemptuousness of the sorts described above, but they may sometimes neglect to ground respect securely on well considered understandings of merit; and they

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<sup>34</sup> XIOABANG LI, *A HISTORY OF THE MODERN CHINESE ARMY* 232 (2007)(at a mass meeting in 1966, Lin Biao “exhorted the Red Guards to ‘smash’ the Four Olds: ‘the old concepts, culture, customs, and habits of the exploiting classes.’”).

<sup>35</sup> Socializing at a tea-house, for example. See JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 289-91 (1991).

<sup>36</sup> See *id.* at 290:

“I had been brought up to be courteous and respectful to anyone older than I, but now to be revolutionary meant being aggressive and militant. Gentleness was considered ‘bourgeois.’ I was repeatedly criticized for it . . . . Over the years of the Cultural Revolution, I was to witness people being attacked for saying ‘thank you’ too often . . . ; courtesy was on the brink of extinction.”

<sup>37</sup> At 172 (Random House ed., 1992). The next sentence reads: “When once you were in the grip of the Party, what you felt or did not feel, what you did or refrained from doing, made literally no difference.”

<sup>38</sup> *Id.* at 56.

<sup>39</sup> ALLEN E. BUCHANAN, *MARX AND JUSTICE: THE RADICAL CRITIQUE OF LIBERALISM* 77 (1982)(“If, as Marx seems to believe, the concept of right plays a significant role in social organization only in societies that have failed to control and minimize competition, scarcity, interpersonal conflict, and the separation of man from man, and if having the concept of respect entails having the concept of persons as right-bearers, then it follows that any society which needs the concept of respect is fundamentally defective.”). Buchanan contests this conclusion.

do hesitate to confer especially high levels of respect in recognition of special excellences. They are regimes of “respect lite.” A British commentator laments:

“[I]n the past to have a good name and a good character were both necessary and sufficient for self-esteem and for gaining the respect of others. . . . This kind of respect was available to everyone, but it had to be earned. Respect was not the cheap and impudent demand of today for automatic acceptance regardless of qualities of character or patterns of behavior.”<sup>40</sup>

John Rawls, in *A Theory of Justice*, recommended a practice which he termed “democracy in judging each other’s aims.” Out of solicitude for the self-esteem of all,<sup>41</sup> he recommended that “as citizens we . . . avoid any assessment of the relative value of one another’s way of life.”<sup>42</sup>

*C. The Syndromes of Mendacity and Disrespect; Veracity and Respect:  
Some Reflections.*

Mendacity and disrespect often seem to go together, and it is easy to surmise some reasons why they may. To tell someone a lie is also usually to disrespect him, as acts of a harmful nature often are, by implying that he does not deserve the level of decent treatment to which most people are entitled. To speak disrespectfully often also involves mendacity. It is, if intended literally, a lie to call someone a dog or to say that he is not fully human.

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<sup>40</sup> CHRISTIE DAVIES, *THE STRANGE DEATH OF MORAL BRITAIN* 43 (2004).

<sup>41</sup> Page 440 (1972)(self-esteem is “perhaps the most important primary good.”).

<sup>42</sup> *Id.* at 442 (1972):

“[a]s citizens we are to reject the standard of perfection as a political principle, and for the purposes of justice avoid any assessment of the relative value of one another’s way of life. . . . Thus what is necessary is that there should be for each person at least one community of shared interests to which he belongs and where he finds his endeavors confirmed by his associates. And for the most part this assurance is sufficient whenever in public life citizens respect one another’s ends and adjudicate their political claims in ways that also support their self-esteem.”

It can be but a very thin confirmation or “assurance” which is not founded on an assessment of merit. If you avoid making any judgments as to the value of what a person does or who he is, anything you are likely to say to “support [his] self-esteem” may be mendacious.

More fundamentally, the comprehensive flight from reality involved in systematic mendacity places the fugitive fantasist in a position of apprehension and adversity with regards to anyone who might be inclined to let daylight into his cave. During the Cultural Revolution, those who expressed skepticism about monster cucumbers and the like were attacked and humiliated.<sup>43</sup> Comprehensive “epistemological mendacity”: the flight from logic and reason – gives the delusionist reason to dislike and extrude practitioners of modes of thought he has rejected; or to devalue and distort their activities (characterizing teaching as “cramming” knowledge into students<sup>44</sup> and engaging in “intellectual acrobatics,”<sup>45</sup> for example).

Contrariwise, the endorsement of contemptuous conclusions about wide sectors of humanity and its institutions cannot be sustained, in a world which has much good as well as much evil about it, without a departure from fair-minded consideration of reality. Comprehensive contempt for man entails contempt for his intellect, and a propensity to discredit philosophical conclusions.

Quite the reverse can be observed about veracity and respect, which reinforce one another along lines similar to those along which mendacity and disrespect interact. Telling someone the truth, especially the truth one would rather conceal, acknowledges his entitlement to honorable treatment. Treating someone with respect -- respectfully acknowledging his merits – is a project best founded upon an honest appraisal and a truthful account of what his merits really are. A political regime which founds its claims to loyalty and support on a truthful account of real merit will flourish by promoting practices of reason among its citizens, and will recognize and respect those who succeed at thinking clearly.

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<sup>43</sup> JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 224 (1991) (“people who refused to boast of massive increases in output were beaten up until they gave in.”).

<sup>44</sup> II ADOLPH HITLER, *MEIN KAMPF* chapter 2 *passim* (1926), deploring the practice of schools’ “cramming” knowledge into students.

<sup>45</sup> WILLIAM SHIRER, *THE RISE AND FALL OF THE THID REICH: A HISTORY OF NAZI GERMANY* 248 (1990 ed.) (quoting the regime’s Prussian Minister of Science, Art and Education as boasting that he had “succeeded overnight in ‘liquidating the school as an institution of intellectual acrobatics[’”).

*D. Veracity and Respect by the Law: Some Reflections.*

A successful stand for the practices of veracity and respect may be taken at the bar of justice and in the witness boxes, counsel tables, and judicial benches of courts of law.

The trial, for example -- because of its dramatic social profile and authoritative status; because of its insulation from the marketplace and the political hustings; because of the care and caution induced by the weighty matters of life and fortune which balance in its scales; because of its rules of evidence and its practices of cross examination and debate; because of its openness to scrutiny; because of its amenability to correction through judicial review -- the courtroom trial is for these reasons especially well qualified to unmask mendacity and to sustain practices of veracity. By affording to everyone his "day in court": his right to testify, to be represented by counsel, and to cross-examine opposition witnesses -- the trial manifests respect.

Similar points apply to the proceedings of appellate courts and legislatures. The patience and care invested in common-law appellate judging and the precision which is frequently devoted to statutory drafting are exercises in veracity and conduce to practices of respect. The pursuit of coherence and consistency, year in and year out, case by case, is a notable exemplar to the entire community of how practices of reason may be conducted and veracity ensured. Altogether, the law is well positioned to tether the social and political worlds to the stanchions of objective reality and the practices of honor and respect, and to shine a strong beam of light on structures of pseudological obscurity.

Regrettably, the law itself occasionally suffers disorders of thought and reason. Those who speak for the law may be vulnerable to the suasions of ethical skepticism, relativism or nihilism<sup>46</sup> and so lose their sense of the "weight" of

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<sup>46</sup> See generally MOHAMMAD A. SHOMALI, *ETHICAL RELATIVISM: AN ANALYSIS OF THE FOUNDATIONS OF MORALITY* (2001); MICHAEL PHILIPS, *BETWEEN UNIVERSALISM AND SKEPTICISM: ETHICS AS SOCIAL ARTIFACT* (1994); *RELATIVISM: COGNITIVE AND MORAL* (Jack W. Meiland & Michael Krausz, eds., 1982).

H.L.A. Hart -- the most influential jurisprudence scholar in the English-speaking world for the past forty years -- was an ethical skeptic. See H.L.A. Hart, "Who Can Tell Right from Wrong?," *N. Y. REV. BOOKS* (July 17, 1986), available at <http://www.nybooks.com/articles/5056> (accessed July 2, 2008) ("unless I am already committed to the motivations of an impartial morality, reflective deliberation will not lead me to it."). See John Finnis, *Hart's Ways: Law as Reason and as Fact*, 52 *AM. J. JURIS.* 25, 50-51 (2007) ("Was the moral scepticism to which Hart gives restrained but clear voice

“life’s normal relationships” (“all such normalities are parched and dead within them”).<sup>47</sup> They may come to surmise that major legal principles -- principles of freedom for example,<sup>48</sup> or justice,<sup>49</sup> or equality – protect no objective goods. They may come to apprehend that words have no set correspondences, that propositions convey no objective meanings, and that rules and principles are infinitely malleable. They may accept the doctrines of positivism, which proposes that things are only what people make of them; that human associations are creations of fiat; and that juristic status is independent of requirements of ethics. Although a skeptic need not be a Bovaryst, nor a stupid nor an arrogant person, his theory if consistently extended leads along similar paths. If his views are correct, all speech depicts pseudological space and the law itself is a pseudological world.

Skepticism vitiates practices of legal veracity. Legal principles which demand the vigilant pursuit of truth lose their traction where truth is surmised to be illusory. Rules of evidence and other rules of legal procedure – the “epistemological morality of the law” – deteriorate where their obvious purpose – getting at the truth – is suspect. The virtues surrounding and supporting veracity, such as candor as to the basis for a conclusion and lucidity in defining and expressing it, stand to suffer a similar deterioration. (One understandably has mixed feelings – mixed motives – when called upon to depict the shaky structure underlying an important conclusion; and it is difficult steadily to focus upon a mirage.)

Skepticism compromises a legal system’s ability or willingness to speak with common sense and in commonly understandable English. Ordinary language

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in his last work a change of direction for him, something extrinsic to the architecture of his main work in the philosophy of law? I feel sure it was not.”).

<sup>47</sup> I HEIMITO VON DODERER, *THE DEMONS* 493 (Richard & Clara Winston, trans., 1961).

<sup>48</sup> See, e.g., Executive Board, American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542 (1947)(available on jstor), reprinted in MORTON E. WINSTON, *THE PHILOSOPHY OF HUMAN RIGHTS* 116, 119 (1989)(“Standards and values are relative to the culture from which they derive.”; “the eternal verities only seem so because we have been taught to regard them as such . . . .” “man is free only when he lives as his society defines freedom . . . his rights are those he recognizes as a member of his society . . . .”).

<sup>49</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 48-49 (Anders Wedberg, trans., 2007)(“Something is just or unjust only for an individual for whom the appropriate norm of justice exists, and this norm exists only for those who, for some reason or other, wish what the norm prescribes. \* \* \* [T]he norm of justice . . . is ultimately an expression of the interest of the individual who pronounces a social institution to be just or unjust.”).



and discourse is grounded in common-sense appreciation of good and bad and right and wrong. It sounds that way and “feels” that way. Modern legal theorists of a skeptical bent – and, increasingly, common-law judges of an academic influence -- develop specialized, difficult, and self-involved systems of speaking and thinking. They are drawn to specialized definitions which diverge from common understandings.

Skepticism may diminish practices of respect. This will occur where familiar paradigms of virtuous or villainous conduct are debunked. Practices of respect are most appropriately responses to merit.<sup>50</sup> Where standards of merit are thought to be idiosyncratic, practices of merit-based respect will lose their traction. Where standards of merit are thought to be arbitrary, respect may be understood as a reflex of feeling or an acknowledgement of threat.

## II. DEFINITIONS.

### A. *Veracity.*

Veracity consists of the practice of telling the truth and of the character traits which lead a person to truthfulness. Mendacity is its opposite.

The virtues of veracity are fully exercised when a speaker attends to a matter, attains insight into it, and faithfully communicates his true understanding to another person, seeking to induce the hearer to consider what the speaker is trying to communicate and to accept as true the speaker’s expressed understanding.<sup>51</sup> At a fundamental level, veracity entails a disposition to credit that there is such a thing as truth: a rejection, in other words, of epistemological skepticism. Veracity includes a willingness and capacity to discern the truth and to report it faithfully. Veracity involves – and especially so in complex matters, within a lengthy exchange of communications -- the ability and commitment to practices of clarity, coherence, and consistency. It extends to the promotion of a dialectic in which both sides seek the truth and cooperate in understanding, formulating, and communicating it.

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<sup>50</sup> See the definition below at II B.

<sup>51</sup> Another element might be added: it might be said that the speaker invites the hearer to believe *because of trust in the speaker*. Cf. Paul Faulkner, *What Is Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RES. 524 (2007), which develops the insight that lying is bad because, among other reasons, it involves inviting trust, and then betraying it.

The vices of mendacity are indulged when the speaker fails to exercise the virtues of veracity. At a fundamental level, mendacity may arise from a contemptuous disregard for the possibility that there are any basic truths, or any which relate to the matter under discussion, or any that need guide the mendacious person's speech. Less drastically, the vices of mendacity operate when a speaker slides into uncaring imprecision of expression and slippery, unstable practices of definition.<sup>52</sup> Degeneracy of speech is in some cases a form of mendacity.

The vices of mendacity flourish in a political regime whose officials' perception of the truth is distorted by fear or by a shamed aversion to their own characters or to their regime's history and intentions. They flourish in a regime, like that in Orwell's *Nineteen Eighty-Four*, where officials, or some of them, hardly attempt any longer critically to consider whether what they say is true.<sup>53</sup> They flourish in those instances where officials no longer expect to be fully believed (as may have been the situation in some Eastern European countries in the latter stages of communism). Projects of confabulation involve mendacity.<sup>54</sup>

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<sup>52</sup> Thus mendacity as here understood is broader than lying, as that term is defined in many authorities which define lying to exclude negligent or ignorant false speech. E.g. BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* 96 (2002) ("I take a lie to be an assertion, the content of which the speaker believes to be false, which is made with the intention to deceive the hearer with respect to that content."); SISSELA BOK, *LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE* 15 (2d ed. 1999) (a lie is "an intentionally deceptive message in the form of a statement."); J.E. Mason, *A Definition of Deceiving*, 21 *INTERN. J. APPLIED PHIL.* 181 (2007). See Arnold Isenberg, *Deontology and the Ethics of Lying*, in *AESTHETICS AND THE THEORY OF CRITICISM: SELECTED ESSAYS OF ARNOLD ISENBERG* 245, 249 (William Callaghan, Leigh Cauman & Carl G. Hempel, eds., 1988) ("A mistaken utterance is not as such a lie.").

<sup>53</sup> At 57 (1949) (Random House ed., 1992): "[I]t was not the man's brain that was speaking, it was his larynx. The stuff that was coming out of him consisted of words, but it was not speech in the true sense; it was a noise uttered in unconsciousness, like the quacking of a duck."

<sup>54</sup> Is it a lie to make a false statement that you know will not be believed? See Roy Sorensen, *Bald-Faced Lies! Lying without the Intent to Deceive*, 88 *PAC. PHILOSOPHICAL Q.* 251 (2007), available at <http://artsci.wustl.edu/~philos/people/sorensen> (accessed June 28, 2009) (stating on the first page that "[t]he wrongness of lying springs from the intent to deceive – just the feature missing in the case of bald-faced lies."). See generally J.E. Mason, *A Definition of Deceiving*, 21 *INTERN. J. APPLIED PHIL.* 181 (2007) ("deceiving is necessarily intentional, [requiring] that the deceived person acquires or continues to have a false belief."). It helps to divide this problem into two categories.

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One category includes euphemisms. Someone who says she was “powdering her nose” is not a liar. The story is told of Arthur Rubinstein’s servant Francois, who informed an untimely telephone caller that the great man was not at home. “But I hear him playing,” the caller protested. “You are mistaken, madame,” the servant replied. “I’m dusting the piano keys.” CLIFTON FADIMAN & ANDRÉ BOULARD, *BARTLETT’S BOOK OF ANECDOTES* 471 (2000). See Arnold Isenberg, *Deontology and the Ethics of Lying*, in *AESTHETICS AND THE THEORY OF CRITICISM: SELECTED ESSAYS OF ARNOLD ISENBERG* 245, 256-57 (William Callaghan, Leigh Cauman & Carl G. Hempel, eds., 1988):

“[T]he words ‘She is not at home,’ delivered by a servant to a relative at the door, have become a mere euphemism for indisposition or disinclination. Since the author of the message knows that the recipient will interpret it as a polite way of saying, ‘it is inconvenient for me to see you now,’ there is no intention of making him believe something that she (the author) does not believe . . . [A] polite lie is often not a lie at all.”

Many euphemisms are not false statements at all. In context, they have a clear meaning which is in accord with the truth. They may be assigned that meaning by the specialized community in which they are used. (“The batter walked” is a true statement even if he jogged to first base.). They may be assigned a special meaning by the community as a whole; one which diverges from the meaning that might be inferred by parsing it out word by word. (“Powdering my nose” is like that.). (“Rubinstein is not at home” is not so clearly assigned a specialized meaning and cannot certainly, at least in contemporary American culture, be defended in this way.). As these comments suggest, the defense of a euphemistic “falsehood” depends upon its unambiguously bearing the true alternate meaning.

A second category might be called “confabulation,” and is best illustrated with a story. A young man who lives quite some distance away sneaks into his father-in-law’s chicken coop at five A.M. and emerges, two dead hens in hand, to be apprehended by his father-in-law at shotgun point. He offers as an explanation that he was “checking the coop” and frightened away a thief. Of course the father-in-law does not believe this (and the son-in-law knows that he does not). But the father-in-law accepts the explanation for the sake of family peace. (The story is from Roy Sorensen, *supra*, page 5.). The statements of the son-in-law cannot be found to have a true specialized meaning. They are undisputably false. But they are not intended to produce belief (quite likely). They are intended, rather, to invite the father-in-law into the project of confabulation: of acting and speaking as though the statements were true.

What is the morality of confabulatory statements? They do not involve one of the worst evils of mendacity, namely that of planting false beliefs in the mind of the hearer. Neither, however, do they fully participate in the goods of veracity. They close off disclosure and dialectics as to the truths of the situation. (If he is stealing chickens because his family is hungry, the father-in-law needs to know that but the son-in-law has maneuvered himself into a situation where he is unlikely ever to admit it.). Such

## B. Respect.

1. *In General.* -- Respect involves attending to, understanding, and crediting merit. The practices of respect include speaking in a way that shows attentiveness to merit and acknowledges it. At a fundamental level, respect therefore involves eschewing ethical skepticism; crediting the possibility of merit; endorsing a system of merit and demerit; and participating in a system of discourse which acknowledges the good and bad, the impressive and the unimpressive, the honorable and dishonorable.

Disrespect is the corresponding vice, and is exercised most blatantly when someone speaks insultingly, denying merit or attributing false demerit. (Sometimes, furthermore, attributing *actual* demerit disrespects, for example when it is none of the speaker's business.). Uncaring slovenliness of speech can also, in some cases, exhibit disrespect.

2. *Basic Respect and Special Respect.* -- It helps to distinguish two kinds of respect.<sup>55</sup> One sort - here, "basic respect" - is applicable to anyone. This is so because basic respect consists in attending to, understanding and crediting that sort of merit which inheres in simply being human.<sup>56</sup> ("Basic disrespect" consists in denying this sort of merit, or in simply refusing to attend or understand it. Calling someone a dog exhibits basic disrespect.).

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statements embarrass candid discussion about ramifications. (What happens next time? How many chickens will the father-in-law tolerate losing; how can he make his limits clear within the mendacious structure that has been created?) Such statements likely lead on to lying to others. ("Why were you out with your shotgun, darling?") Many extensive projects of political pseudologia proceed through instances of confabulation like this one.

<sup>55</sup> Compare STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 120 *et seq.* (2006), proposing the categories "recognition respect" and "appraisal respect." Recognition respect is to be awarded not because of special merit but as "the fitting response to dignity" - dignity being defined as the "authority of an equal: the standing to make claims and demands of one another as equal and free rational agents." *Id.* at 120-21. It is "'what we owe to each other' as equal moral persons." *Id.* at 122. Appraisal respect, on the other hand, "is esteem that is merited by conduct or character." It is "moral esteem: approbation for her as a moral agent." *Id.*

<sup>56</sup> Compare *id.* at 122-23 (2006) (Recognition respect "is no form of esteem at all. \* \* \* \* The idea is not that personhood is some kind of admirable quality."). *Per contra*, it is admirable; human persons are "wondrously made"; and even the worst scoundrels possess ("deep down" or as latent potentialities, at least) numerous admirable qualities.

Another sort of respect can be called “special respect,” and involves attending to, understanding, and crediting special merits. The term “special” does not signal specially large or great. It is used in the sense involved in the term “specialty.” Special respect is lacking when you call a lawyer a doctor or a doctor a lawyer. When, in *Brideshead Revisited*, his host pretended throughout dinner to mistake Charles Ryder for an American (“come and see us again next time you ‘cross the herring pond’”), he disrespected him.

Thus, a failure of special respect need not involve derogation. Special respect fails when the person in question is mis-located, even though into a category which is just as elevated or even loftier than his proper one. Respect entails attending to and understanding what a person really is; disrespect implies not caring enough about the other person to understand his real situation or to speak accordingly.<sup>57</sup> Failure to respect even in this latter sort of way – “special disrespect” – is also deplorable and falls within the criticisms of this Article when practiced by a legal official.

3. *Implicit Disrespect?* – This Article deplores disrespectful *express* statements. Some might extend the condemnation to statements which are merely implicit. Professor Ronald Dworkin, for example, applying his requirement that the law manifest “equal concern and respect,” would oppose the government’s adopting any legal restraint “in virtue of an argument” which undermines a citizen’s “sense of equal worth.”<sup>58</sup> Even an unstated argument would count; the unacceptable premise may be inferred.<sup>59</sup>

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<sup>57</sup> Should the definition be extended to include attending to and understanding characteristics which do not amount to merit? On the one hand, it does not seem to be disrespectful to call a thief an honest man; and an attitude of oblivious disregard for another person’s gaffes or the disreputable episodes in his past may actually be a way to show respect for him. On the other hand, omitting to take the trouble to spell or pronounce someone’s name correctly may be disrespectful. It seems that we can explain the disrespectful character of this latter sort of behavior without greatly expanding the definition, if we note that most people *regard it* as a component of an honorable position in society that people know their names and pronounce them correctly, and they regard honorable position as meritorious. The definition might thus be extended by allowing that respect entails understanding, attending to, and acknowledging those attributes which the other party *regards as* meritorious.

<sup>58</sup> A MATTER OF PRINCIPLE 205-206 (1985). Here is a fuller excerpt:

“[T]he government . . . must impose no sacrifice or constraint on a person in virtue of an argument that the citizen cannot accept without abandoning his sense of equal worth. . . . [N]o self-respecting person who believes that a

Implicit speech is usually problematic. One reason for this is that the implication will usually be ambiguous. Consider, for example, laws prohibiting pornography. Professor Dworkin observes that such prohibitions are (“likely”) based on “the hypothesis that the attitudes about sex displayed are demeaning or bestial” and concludes that such prohibitions are usually objectionable (“even though this hypothesis may be true”).<sup>60</sup> But then, as Dworkin concedes, some prohibitions might instead be based on the conclusion that pornography causes crime or absenteeism from work.<sup>61</sup> What of a prohibition which is based more on the latter sort of conclusion than the former? Does the Dworkinian principle condemn a prohibition where some of the implicit conclusions are damaging to the sense of self-worth but others are not? What of a legislative prohibition which is based *entirely* on concerns of the latter sort: might the legislation fall under the Dworkinian condemnation where someone might inaccurately infer the insulting implication rather than the actual one?<sup>62</sup>

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particular way to live is most valuable for him can accept that this way of life is base or degrading.”

<sup>59</sup> Note the reference to the “apparent or plausible” justification in the passage quoted in the next footnote.

<sup>60</sup> *Id.* at 354. Here is a fuller excerpt:

“People have the right not to suffer disadvantage in the distribution of social goods and opportunities . . . just on the grounds that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong. \* \* \*

\* \* \*

“[The government] violates the right . . . when the only apparent or plausible justification for a scheme of regulation of pornography includes the hypothesis that the attitudes about sex displayed or nurtured in pornography are demeaning or bestial or otherwise unsuitable to human beings of the best sort, even though this hypothesis may be true.”

*Id.* at 353-54.

<sup>61</sup> Dworkin says this is “only academic speculation” because there has not yet been established “a sufficiently direct connection.” *Id.* at 355.

<sup>62</sup> Further questions arise if we hypothesize another legislative motive: one of concern for the young models who might be put on pornographic display. Would the protective statute escape the Dworkinian condemnation? Not necessarily: the viewers’ sense of self-worth might be undermined by the shame of surmising that their legislature regarded them as lascivious persons whose viewing habits damaged the young. Might a Dworkinian respond that the viewers’ sense of self-worth in this matter is inappropriate

As these questions suggest, the Dworkinian approach, and likely any which is based on a condemnation of implicit statements, lead on to difficult questions which elude clear answers. The present Article sticks to explicit statements.

### III. THE GOODS OF VERACITY AND RESPECT BY THE LAW.

To exercise the virtue of veracity and to treat others with respect is to participate in basic goods; and especially so in the case of the law and those who speak for it. This section proposes several ways in which this is the case.

#### A. *General Effects on the Hearer.*

Veracity and respect are beneficial to the hearer in obvious instrumental ways. True speech facilitates the practical projects of life. Respectful speech supports good reputation and high self-regard, both of which are helpful if one is to secure cooperation and to sustain sufficient morale to carry on.<sup>63</sup>

Veracity and respect promote thought and reason – worthwhile activities in themselves, as Aristotle teaches, apart from their serviceability in practical affairs.<sup>64</sup> The truthful speaker may propose wise insights, formulate and

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and disproportional because it had been inflated by sadistic arrogance? Has the Dworkinian test room to allow for considerations of what sorts of self-approbation are appropriate and in what quantity? Alternatively, might a Dworkinian defend the law based on solicitude for the sense of self-worth of the models? Does the Dworkinian test permit us to weigh the one impact against the other; might it even invite to a consideration of all the persons who might think about the law and all the inferences that they might draw, giving weight to each persons' increment to self-worth and each person's detriment?

<sup>63</sup> See generally, JOHN RAWLS, A THEORY OF JUSTICE 440-42 (1971):

“[U]nless our endeavors are appreciated by our associates it is impossible for us to maintain the conviction that they are worthwhile.... \* \* \* [T]he conditions for persons respecting themselves and one another would seem to require that their common plans be both rational and complementary . . . \* \* \* Thus what is necessary is that there should be for each person at least one community of shared interests to which he belongs and where he finds his endeavors confirmed by his associates. \* \* \* This democracy in judging each other's aims is the foundation of self-respect in a well-ordered society.”

<sup>64</sup> See NICHOMACHEAN ETHICS 1177a 17-19 (page 163 of the Terence Irwin translation, 2d ed., 1999):

articulate them, illustrate them, and set them in context. The respectful speaker may propound insights into the good aspects of the person whom he respects, promoting his self-knowledge.

Mendacity displays the opposite tendencies, conducing to foolishness and confusion. Mendacity tends towards the inscription of false sayings on the tablet of the mind, and thence at implanting false belief. It therefore relies for its efficacy on evading the hearer's critical faculties. Not infrequently a willful deceiver seeks to occlude the rationality of his hearer. He may promote intellectual vice: credulity, for example, and inaccuracy of expression or sloppiness of nomenclature ("talking rot"). He may undermine the hearer's confidence in his own judgment, encourage him to endorse conventional prejudices or incite him to practice facile ideologizing. Systematic practices of disrespect may have similar effects, tending, when they are carried to an extreme, to the destruction of the victim's confidence in his judgment and to the undermining of his capacity for firmness in the right. They may induce self-hatred and provoke mutinous passions. Carried to an extreme, they induce that state of intense discomfort identified by von Doderer: an inability to "endure himself"; a desire "to change the general situation because of the impossibility or untenability of his own position"; even a longing to alter "the fundamentals of life in general."<sup>65</sup>

Veracity and respect confer the greater benefit when they emerge from an authoritative source, because they are thence the more widely heard and the more readily credited. They promote the greater benefit when they deal with important topics and commend significant merit. Judicial opinions, statements from the bench, and much other official legal speech deploy an apparatus of learning. They employ a unique, juristic idiom which links them to the modalities of firm judgment and to the normativity of the public community.

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"If happiness [*eudaemonia*: the final good for man] is activity in accord with virtue, it is reasonable for it to accord with the supreme virtue, which will be the virtue of the best thing. The best is understanding . . . and to understand what is fine and divine, by being itself either divine or the most divine element in us. Hence complete happiness will be its activity in accord with its proper virtue and . . . this activity is the activity of study."

"Study" is a translation of a cognate of *theorein*. Irwin explains: "In Aristotle's most specialized use, *theorein* refers to the contemplative study that he identifies as HAPPINESS, or with a part of it. This is study in the sense in which I 'study' a face or a scene that I already have in full view . . .". Terence Irwin, "Glossary," in *id.*

<sup>65</sup> I HEIMITO VON DODERER, *THE DEMONS* 491 (Richard & Clara Winston, trans., 1961).



They propound weighty judgments of guilt and innocence, right and wrong, lawful and unlawful. They may, when things are done especially well, afford exemplars of wisdom. Veracity and respect from legal officials promote those virtues in society generally; mendacity and disrespect promote the corresponding vices. A leading work confirms that the law “changes appearances about what is right and normal and, with that, the entire configuration of social pressures that operate on the individual.”<sup>66</sup> “Law and public policy teach people how to think as well as how to feel about social issues . . . .”<sup>67</sup>

Judicial mendacity and disrespect are for similar reasons likely to be especially destructive. Magistrate Lewis’ comment about “little dogs,” quoted at the outset of this Article, left a mark on Tom which, long afterwards, had still not faded; likely it had a similar effect on his young wife Doris, and perhaps on Walter and Norma as well. Both marriages were, we can surmise, deeply embarrassed.

*B. Effects on the Hearer’s Relationship with the Law.*

Veracity and respect in matters pertaining to the law promote justice on the part of the people who support and obey it.

The point is not merely that you can comply only if you know what the law requires, nor that your expectations of respect or fear of disrespect might motivate you to obey. The most pathological of regimes might endorse a limited degree of veracity and support some practices of respect merely in order to secure obedience. The point, rather, concerns your ability to support the law *well* and to participate in the legal system as a fully just person should. These projects require an understanding of the law’s purposes and aims, and indeed an appreciation of the ethical basis of the legal system and of law itself.

Aristotle develops the underlying ethics. “[P]eople who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either

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<sup>66</sup> DENNIS CHUNG, *RATIONAL LIVES: NORMS AND VALUES IN POLITICS AND SOCIETY* 207 (2000). See Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 749 *et seq.* (2007) (proposing that the law should “respect [citizens’] basic, reasonable interests in leading moral lives” and foster “character traits” which support “the flourishing of just institutions and cultures.” Shiffrin urges that the laws not “severely conflict with social morality. Diverge too severely and the law undermines moral culture and “render[s] moral compliance precious or alien.”).

<sup>67</sup> DENNIS CHUNG, *op. cit.*, at 209.

unwillingly or owing to ignorance.”<sup>68</sup> Fully meritorious obedience – full justice in relations with the law – cannot be founded mainly in fear or in unconsidered habituation. It cannot be the product of psychological conditioning nor the effect of indoctrination in ideological *pseudologia*. It cannot be based on ignorance. It cannot be based in the timorous impulses of those who lack self-respect.

The fully just person’s actions are taken only after “consideration and deliberation.”<sup>69</sup> These projects can progress only if they are based upon knowledge and understanding, bearing fruit in firm conclusions which can be commended as “deliberate opinion.”<sup>70</sup> The just person achieves balanced assessments, develops an understanding of how his actions may relate to the basic good,<sup>71</sup> and arrives at decisions:<sup>72</sup> firm decisions, firmly rooted.<sup>73</sup> A just

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<sup>68</sup> NICOMACHEAN ETHICS 1144a 14-15 (W.D. Ross, trans., rev. J.O. Urmson) , in II THE COMPLETE WORKS OF ARISTOTLE 1729, 1807 (Jonathan Barnes, ed. 1984) (available on past masters database). Here is a fuller quotation:

“As we say that some people who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either unwillingly or owing to ignorance or for some other reason and not for the sake of the acts themselves (though, to be sure, they do what they should and all the things that the good man ought), so is it, it seems, that in order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.”

*Id.* 1144a 14-20. Portions of this passage are revisited, and the translator’s selection of the word “choice” is criticized, in a footnote shortly *infra*.

<sup>69</sup> ARISTOTLE, EUDEMIAN ETHICS 1226b 7-9 (W.D. Ross et al. trans.), in II THE COMPLETE WORKS OF ARISTOTLE 1922, 1942 (Jonathan Barnes ed., 1984)(available on past masters database)(“[C]hoice is not merely simply picking but picking one thing before another; and this is impossible without consideration and deliberation; therefore choice arises out of deliberate opinion.”).

<sup>70</sup> *Id.*

<sup>71</sup> Irwin comments, “deliberation about what promotes an end, is necessary for choosing the correct actions for their own sakes (i.e. as part of the conception of happiness that one has reached by deliberation.”). “Notes” in ARISTOTLE, NICOMACHEAN ETHICS 172, 252 (Terence Irwin trans., 2d ed., 1999).

<sup>72</sup> *Id.* 1144a 18-20 (page 97) (commending – as the “type of action in the state that makes [one] a good person,” – action taken “because of decision and for the sake of the actions themselves.”). Compare the Ross translation: “as a result of choice and for the sake of the acts themselves.” (W.D. Ross, trans., rev. J.O. Urmson, in II THE COMPLETE

person's decisions to comply with the law, and to support it in other ways, are firmly based upon an appreciation of the good of law in general, the justice of the particular law applicable to the matter at hand, and the good of his actions in respecting it.

Veracity promotes the knowledge which is the basis of consideration and deliberation. It grounds deliberation and encourages the practices of reason. Respect supports knowledge of self-worth, and thus firmness in the right.

Mendacity discourages and thwarts those projects. Systematic and thoroughgoing mendacity *aims* to thwart them, and sometimes at the most fundamental level. Tyrants base their power not on reasoned consent but on fear or confusion. They therefore become enemies of reasoned discourse and suppressers of their subjects' self-respect. Mao Tse-Tung banned the use of irony. A biographer reports:

"Helen Snow, wife of Edgar Snow, told us that in 1937, when she was in Yen-an, people could still say things like 'There goes God' behind Mao's

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WORKS OF ARISTOTLE 1729, 1807 (Jonathan Barnes, ed., 1984). The word translated "decision" here is *prohairesis*; Irwin observes: "Many translators use 'choice' to translate it, but this is a misleading rendering, since Aristotle allows choice (*hairesis*) without deliberation or decision, and such choice does not count as *prohairesis*." (Page 322 of the Irwin translation cited above.)

<sup>73</sup> See ARISTOTLE, NICOMACHEAN ETHICS 1105a 28-34 (Terence Irwin trans., 2d ed., 1999, at 22):

"[F]or actions in accord with the virtues to be done temperately or justly it does not suffice that they themselves have the right qualities. Rather, the agent must also be in the right state when he does them. First, he must know [that he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and, third, he must do them from a firm and unchanging state."

(The bracketed words are interpolations by Irwin). Irwin comments:

"The value of virtuous actions, as opposed to a craftsman's production . . . , is not simply determined by its efficiency in producing a product; it also has its characteristic motive. The value of virtue is intrinsic; virtuous action is not valuable simply as a means to some further result (e.g., acting kindly is not simply a means to making someone feel better). The intrinsic value of virtue reflects the virtuous person's motive . . . ."

"Notes," in *Id.* at 172, 196.

back. But seven years on, no one dared say anything remotely so flippant. Mao had not only banned irony and satire (officially, since spring 1942), but criminalized humour itself. The regime invented a new catch-all offence - "Speaking Weird Words" - under which anything from skepticism to complaining to simply wise-cracking could lead to being labeled a spy.

"Mao had decided that he did not want active, willing cooperation (willingness, after all, could be withdrawn). He did not want volunteers. He needed a machine, so that when he pressed the button, all its cogs would operate in unison. And he got it."<sup>74</sup>

### C. *Effects on the Law and Those Who Speak for it.*

Veracity and respect serve obvious instrumental goods in keeping the wheels of government and law aligned. More basically: veracity and respect promote the fundamental good of being a judge or other legal official. Truthful and respectful dialogue within the judiciary, for example, helps make judges fully just. This is so not only in the sense that it refines their conclusions, but also because it deepens their understanding. This makes them more just - noting again Aristotle's insight that to be fully just requires not only arriving at the just result but also approaching it through deliberation and embracing it with thoughtful understanding. Furthermore, truthful and respectful disclosure to litigants and the citizenry generally extends the *beneficence* of the legal official. It makes him co-author of the justice of the citizen.

Judges who misstate doctrine or mischaracterize facts risk the distortion of their own capacity for clarity of thought, truthfulness and respect. The liar "paints a false picture:" he becomes the illusionist of the false world that develops in the listener's mind. The liar risks becoming entangled in his own nets, crediting his own falsehoods and inhabiting, to some degree, the false world he has constructed.<sup>75</sup> As Dostoyevsky puts it:

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<sup>74</sup> JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 247 (2005).

<sup>75</sup> See generally Charles C. Dike, Madalon Baranoski & Ezra E.H. Griffith, *Pathological Lying Revisited*, 33 J. AM. ACAD. PSYCHIATRY & L. 342, 343 (2005)(available on line, accessed July 6, 2009)(according to one line of analysis, "The lie ultimately wins power over the pathological liar, so that mastery over his or her own lie is lost."). A subsequent work, not revisiting this line of analysis, is Charles C. Dike, *Pathological Lying: Symptom or Disease?* 25 PSYCHIATRIC TIMES No.7 (June 1, 2008) (available on line, accessed July 6, 2009).

“[t]he man who lies to himself and listens to his own lie comes to such a pass that he cannot distinguish the truth within him, or around him, and so loses all respect for himself and for others.”<sup>76</sup>

Within a legal system, these pathologies may reinforce each other. An apparatus of functionaries each of whom is lying to himself and others, endorsing some sloganeering ideology, will occlude the relationships among its own members, none of whom will be keen on an intensely honest association with anyone. In some Twentieth-Century regimes, officials came to feel that their collaborators were threats; as indeed anyone is a threat who might display, as in a mirror, some portion of the concealed veracity. The safest associate would be someone neither intelligent nor articulate nor generous with the truth. The mendacious functionary therefore seeks associates who deceive and conceal. To quote von Doderer:

“[S]uch relationships depend upon the involutions of . . . doctrine . . . . That is why it so often happens that the revolutionary finds himself in a group of persons essentially hostile to him . . . . [I]n such groups murder goes the rounds like a bean-bag.”<sup>77</sup>

#### *D. Effects on the Family.*

Practices of veracity and respect are central to a successful marriage, and to other relationships within the family as well. Studies from the social sciences report the adverse effects of marital incommunicativeness and stonewalling<sup>78</sup> and the beneficial effects of practices of communicativeness and respect.<sup>79</sup>

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<sup>76</sup> FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 37 (Constance Black Garnett, trans., 1945). The passage – a speech by Fr. Zosima -- continues:

“And having no respect he ceases to love, and in order to occupy and distract himself without love he gives way to passions and coarse pleasures, and sinks to bestiality in his vices, all from continual lying to other men and to himself. The man who lies to himself can be more easily offended than anyone. You know it is sometimes very pleasant to take offence, isn't it? A man may know that nobody has insulted him, but that he has invented the insult for himself, has lied and exaggerated to make it picturesque, has caught at a word and made a mountain out of a molehill – he knows that himself, yet he will be the first to take offence, and will revel in his resentment till he feels great pleasure in it, and so pass to genuine vindictiveness.”

<sup>77</sup> I HEIMITO VON DODERER, *THE DEMONS* 491 (Richard & Clara Winston, trans., 1961).

<sup>78</sup> Notably John Mordecai Gottman & Robert Wayne Levenson, *The Timing of Divorce: Predicting When a Couple Will Divorce Over a 14-Year Period*, 62 J. MARRIAGE & FAMILY

Practices of veracity and respect develop in large part under the influence of similar practices on the part of others. This is strongly supported in the area of *childhood* moral development by studies in “social learning theory” and cognitive development.<sup>80</sup> Common sense would suggest similar conclusions about adults. Where veracity is little admired, you stand to gain little respect by practicing it. Where people are generally lying, you tend to disrespect them. Where you are held in low esteem, you are tempted to hit back by disrespecting others. When you disrespect people generally, one of the normal motives for telling them the truth is absent.

Historically, government and family have widely been regarded as analogues. The family has been regarded as a “little state” or a “little commonwealth”;<sup>81</sup> marriage as “pre-eminently the basis of civil institutions”;<sup>82</sup>

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737 (2000)(available on jstor); John M. Gottman, James Coan, Sybil Carrere & Catherine Swanson, *Predicting Marital Happiness and Stability from Newlywed Interactions*, 60 J. MARRIAGE & FAMILY 5 (1998)(available on jstor).

<sup>79</sup> E.g. Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 MARRIAGE & CHILD WELLBEING 75, 85 (2005)(available on jstor)(“Another benefit of a positive co-parental relationship is the modeling of interpersonal skills, such as showing respect, communicating clearly, and resolving disputes through negotiation and compromise. Children who learn these skills by observing their parents have positive relationships with peers and, later, with intimate partners.”).

<sup>80</sup> See Lawrence J. Walker, Karl H. Hennig & Tobias Krettenauer, *Parent and Peer Contexts for Children’s Moral Reasoning Development*, 71 CHILD DEVELOPMENT 1033, 1033 (2000) (available on jstor):

“Psychoanalytic theory emphasizes early parent/child relationships in the development of conscience through the mechanism of identification and consequent internalization of values. Social-learning theory . . . emphasizes the power of models and so has also focused on parents’ role in displaying and reinforcing appropriate behaviors. Cognitive development theory . . . holds that interactions with peers are more potent . . .”.

See generally Gareth B. Matthews, *Concept Formation and Moral Development*, in PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 175, 185 (James Russell ed., 1987); A. Bandura, *Social Cognitive Theory: An Agentic Perspective*, 52 ANNUAL REVIEW OF PSYCHOLOGY 1 (2001), available at [www.des.emory.edu/mfp/Bandura2001ARPr.pdf](http://www.des.emory.edu/mfp/Bandura2001ARPr.pdf). Cf. JOHN SNAREY, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY (1993).

<sup>81</sup> John Witte Jr., *The Tradition of Traditional Marriage*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 47, 58 (Lynn D. Wardle et al., eds., 2003). See also JOHN WITTE, JR., FROM

governments have been regarded as similar to fathers. Episodes of distortion in political bonds are often accompanied by systematic disruptions in familial bonds as well. Veracity and respect by those who speak for the law are likely to be promoted by the example of similar practices within the family and thus to strengthen family bonds; mendacity and disrespect are likely to undermine them.

#### IV. WHAT CONSTITUTES VERACITY AND RESPECT ON THE PART OF THOSE WHO SPEAK FOR THE LAW? SOME SPECIAL CASES.

##### A. *Technical Terms; Legal Fictions.*

No one would convict the Treasury Department of mendacity if its regulations determined a company's "net operating loss" by using elements which would not seem pertinent to a lay person. This is because their context signals the likelihood that they bear a special meaning. There is no ordinary English understanding of "net operating loss."<sup>83</sup>

Principles of veracity and respect have more traction where legal speech has an "ordinary English" ring to it and the indicia of technical meaning are slight. Courts have applied admiralty law to hold a ship to be "unseaworthy" which has slop on the railing, dangerous but not likely to cause the vessel to sink.<sup>84</sup> This legal fiction may fall short of full veracity and respect, but the edge of the criticism is blunted by the context: the opinions of judges applying a

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SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION (1997).

<sup>82</sup> "In every enlightened government [marriage] is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." *Maynard v. Hill*, 125 U.S. 190, 213 (1888), quoting [Noel v. Ewing, 9 Ind. 37 \(1857\)](#).

<sup>83</sup> See note 54, *supra*, explaining why it is not mendacious to say "I am going to powder my nose" or "the batter walked" even when those statements, taken literally, would seem to mean something contrary to the facts.

<sup>84</sup> See ROBERT FORCE, A.N. YIANNOPOULOS & MARTIN DAVIES, *ADMIRALTY AND MARITIME LAW* 453 (abridged ed., 2006).

specialized branch of the law – and by the audience: a specialized industry. These circumstances imply the likelihood of technical and unusual meanings.<sup>85</sup>

Principles of veracity and respect are violated, however, when a judge or legislature, speaking without sign of technicality and out into the community at large, using what appears to be the community's language – albeit having a technical or variant meaning in mind – characterizes persons as something different than what they are in an important way. Those principles are violated, for example, when the law describes someone as a thief who has innocently purchased stolen property.<sup>86</sup> Modifiers such as “constructively” or “legally” or “deemed to be” may not be enough to absolve the speaker then. A good thought experiment is to imagine yourself in open court or town meeting being told, “Mr. Reader, you are a thief.” Or, “Mr. Reader, you are legally a thief.” Or, “you are a thief in the eyes of the law,” or even “you are a constructive thief.” If in fact you were merely the good-faith purchaser of the stolen goods these statements would be mendacious and disrespectful.

### *B. Speech About Social Institutions.*

Establishing the truth about a social institution presents special complexities. Take hospitals and the profession of nursing as examples.

1. *Legal-Positivist Approaches.* – The law licenses hospitals and nurses and establishes many of their standards of practice. Legal doctrine thus provides one basis for assessing the veracity and respectfulness of those who speak about hospitals and nurses. This basis alone establishes that it would be mendacious and disrespectful to deny that Massachusetts General was a hospital or that its RNs were authorized to practice nursing.

2. *Social-Positivist Approaches.* – Legal analysis provides only part of the story. Hospitals and the healing professions organize across national boundaries, performing much the same functions under different legal systems. They survive regime change without basic alteration, and some might survive

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<sup>85</sup> Remove the matter from its specialized context and the criticisms are not blunted. Were a federal judge to state unqualifiedly in an after-dinner speech that Carnival Cruise Line ships were frequently unseaworthy he would be subject to criticism for mendacity and disrespect without the “technical meaning” excuse being available to him.

<sup>86</sup> See *Bruhn v. Virginia*, Record No. 0818-00-2 (2002)(Bumgardner, J., dissenting) (“The General Assembly in 1847-48 enacted a revised Criminal Code that declared that any person who receives stolen property . . . shall be deemed guilty of larceny thereof. . .”).



the withering away of the state. Hospital administrators and nurses do not look only to the law. They look also to custom and social morality: to the expectations and beliefs of patients, families, and the community as a whole.

A supreme court justice would violate principles of veracity if he ruled that a country club was a hospital or that a building contractor was a nurse. This would be true where no precedent or statute bore on the matter. His opinion would conflict with the understanding of hospitals and nursing as established by society.

Reliance on social understandings has much to commend it. It leads the law out of the self-referential cave, discouraging the practices of *pseudologia*. It leads the law to speak to the community in the community's own terms, promoting veracity in society generally. It leads the law to take community standards into account in allocating respect, reinforcing the community's system of honor.

3. *Beyond Law and Social Morality.* -- Hospitals and the healing professions exist across cultural boundaries just as they do across legal ones. They do not always change when culture changes. Physicians and nurses consider, besides the law and social morality, the requirements of patient health.

Suppose a society in which, owing to ignorance, clinics leech blood and hospitals, not understanding the medical value of disinfectants, omitted to use them except for cosmetic and janitorial purposes. Social standards might lead a judge to conclude that the leeching clinic was a medical facility and to deny that cleansing workers were performing the function of nurses. But if new medical research established to a judge's satisfaction that leeching blood has no medical value and that disinfectants prevent infection, she might conclude instead that a bleeding clinic was not truly a medical establishment, and that a profession devoted to applying the leeches was not properly a branch of nursing. Similarly, she might conclude that cleansing workers formerly classified among the housekeepers were properly speaking performing the functions of nurses. She might say these things in a judicial opinion without violating the principles of veracity or respect. Principles of veracity and respect require consideration of objective goods.<sup>87</sup>

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<sup>87</sup> A deeper sort of positivism might be employed, as something of an intermediate approach. Such an approach would proceed by looking beyond the specifics of social morality to the principles underlying them. Normally a society's social morality of medicine will reflect its commitment to health. The judge can be guided by the principles underlying the specifics of community speech and practices.

4. *Mixed Cases; Hard Cases.* – What where intractable conflicts arise between the determinations of the legal order and the social, or between legal and social norms on the one hand and basic nonpositive considerations on the other? What, for example, where the law and the social order supported leeching and remained intransigent in that support despite the emergence of conflicting evidence about patient health? What if public opinion and the positive law rated tradition higher than health?

There often is no easy answer in such cases. Principles of veracity and respect should lead a judge or other legal official candidly to depict the divergences involved in the normative situation, encouraging a dialogue which might eventually lead to restoration of congruity and good sense.

## V. IMPLICATIONS FOR SPEECH ABOUT THE FAMILY.

Several examples here illustrate how the requirements of veracity and respect apply to speech about the family.

### A. *The Existence of the Wife.*

Historically, some legal authorities endorsed the doctrine that a married woman was not a person or, perhaps, not a separate person. Blackstone's *Commentaries* stated that "the very being or legal existence of the woman is suspended during the marriage."<sup>88</sup>

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<sup>88</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Bk One, ch. 15 (1765-69), available at <http://www.lonang.com/exlibris/blackstone/index.html> (accessed July 11, 2009):

"By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything . . ."

*See* Boone v. Boone, 345 S.C. 8, 11, 546 S.E.2d 191, 192 (2001)(referring to the historical "legal fiction that husband and wife share the same identity in law, namely that of the husband."); Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 588 (1881)(under the "old common law \* \* \* [t]he civil existence of the wife was merged in that of her husband.").

It must be conceded that, as Aristotle observes, there is a sort of unity between close friends.<sup>89</sup> Scripture uses the term “one flesh.” Nevertheless it makes no sense at all to pretend that when a friendship or a marriage or some other close affiliation between two people forms up, one of them ceases to exist. Were that to happen, there would no longer be a friendship, or a relationship of any sort.

Statements that the existence of a woman is suspended during marriage are thus false, philosophically and psychologically; and they are of course also disrespectful. Insofar as they attempt to depict the social facts of marriage, they are equally preposterous, diverging from that institution as it is discussed and lived today or in Blackstone’s time or during the centuries when the common law was formed. (Was the Wife of Bath a separate person?) Such statements can be deplored as violating the principles of veracity and respect, and any defense based on the observation that they are merely legal fictions or technical speech can be rejected for the reasons set forth in Part IV A, *supra*.

These conclusions can be endorsed without debating consequentialist arguments such as that based on protecting the woman from unfair bargains she might enter into without the advice of her husband, or that adducing the importance of domestic peace (“where two or more persons are destined to pass their lives together, one should be endued with such a pre-eminence as may prevent or terminate all contestation.”).<sup>90</sup>

#### B. Spousal Status Outside of Marriage.

Ontario law endorses the proposition that people who are not married to one another are nevertheless spouses. This doctrinal misadventure has introduced vast uncertainty into the meaning of the term “spouse,” and has led on to legal

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<sup>89</sup> ARISTOTLE, NICOMACHEAN ETHICS 1170b 7-9 (Terence Irwin trans., 2d ed., 1999, at 150)(“The excellent person is related to his friend in the same way as he is related to himself, since a friend is another himself.”).

<sup>90</sup> PEREGRINE BINGHAM, THE LAW OF INFANCY AND COVERTURE 182 (2d American ed., 1849). The passage continues: “And why is this pre-eminence exclusively vested in man? -- Simply, because he is the stronger. . . . [G]ive but the legal authority to the wife, and every moment would produce a revolt on the part of the husband, only to be quelled by assistance from without.”). For a learned discussion see I CHARLES J. REID, JR., LUCIFER’S CHILDREN: A STORY OF FREE LOVE, RELIGION, POLITICS, AND LAW IN NINETEENTH-CENTURY AMERICA ch. 5 (forthcoming).

doctrines which diverge from social understandings and which embarrass doctrinal development, as will here be explained.<sup>91</sup>

The Ontario Family Law Act provides that the term “spouse” “includes either of two persons who are not married to each other and have cohabited . . . continuously for a period of not less than three years.”<sup>92</sup> “Cohabit” is defined in section 1(1) as meaning “to live together in a conjugal relationship, whether within or outside marriage.” (The term “conjugal relationship” is not there defined.).

Leading cases leave the Ontario law fluid. The court in *Mahoney v. King* identified seven factors each with subparts amounting to twenty-two in the aggregate.<sup>93</sup> Not included among these components is any oath or pledge or assurance that the parties might have made to one another. There is no mention of love.<sup>94</sup> There is no reference to a duty to honor and cherish. There is no direct mention of an intention to remain lastingly loyal. One component, to be sure, is that of fidelity, phrased as a question: “Did they maintain an attitude of fidelity to each other?”<sup>95</sup> (Note the implication that fidelity is attitudinal, rather than a

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<sup>91</sup> See generally Ruth L. Deech, *The Case Against Legal Recognition of Cohabitation*, 29 [INTERNATIONAL & COMP. L. Q.](#) 480 (1980).

<sup>92</sup> R.S.O. 1990, c. F-3, s. 29 (“In this Part, . . . ‘spouse’ means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.”).

Section One provides that “‘cohabit’ means to live together in a conjugal relationship, whether within or outside marriage” and that “‘spouse’ means either of two persons who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.”

Several other Ontario provisions define “spouse” in unusual ways, as cited and described in an appendix to *Rosenberg v. College of Physicians and Surgeons*, cited *infra*.

<sup>93</sup> [1998] R.F.L. (4<sup>th</sup>) 361 (Ont. Gen. Div.) paragraph 6, citing *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) .

<sup>94</sup> Though one question on the court’s list is “[w]hat were their feelings towards each other?”. Paragraph 6 of the opinion; item (ii)(c).

<sup>95</sup> Paragraph 6 of the opinion; item (ii)(b). (Item two is “Sexual and Personal Behaviour.”).

matter of belief or obligation). Absent from among the elements is any reference to exclusivity.

Ontario law endorses the conclusion that you can be one person's spouse at the same time that you are married to someone else. In *Sullivan v. Letnik*,<sup>96</sup> an Ontario court held that a cohabiting couple had established spousal status even though each was already married.<sup>97</sup> In *Mahoney v. King*, Sandra Mahoney claimed that she was her ex-lover's "spouse" even though he was married to someone else during his affair with Mahoney and continued throughout to live with his wife. The court held that Mahoney's claim was sufficiently meritorious to go to trial. It observed that "[i]ssues relating to the definition of spouse are in transition."<sup>98</sup>

Absent from among the definitional components is, astonishingly, any requirement that the couple reside together for three years, despite what would seem to be the clear mandate of the statutory phrase "live together in a conjugal relationship . . . continuously for a period of not less than three years." In the *Sullivan* case, the court held that continuity of cohabitation was established across a lengthy time period when Mrs. Sullivan refused even to set foot on the

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<sup>96</sup> [1994] 5 R.F.L. (4<sup>th</sup>) 313 (Ont. Unif. Fam. Ct.), rev'd in part on other grounds [1997] 27 R.F.L. (4<sup>th</sup>) 79 (ont. C.A.) (applying a statute in force prior to the present Family Law Act). See *Perkovic v. McClyment*, [2008] 57 R.F.L. (6<sup>th</sup>) 57 (Ont. Sup. Ct. J.) (ascribing spousal status to a man who was married to someone else). The case-law on these issues is discussed in MARY JANE MOSSMAN, *FAMILIES AND THE LAW IN CANADA* 510 et seq. (2004).

<sup>97</sup> The court in the Mahoney case, discussed just infra, makes this conclusion explicit, stating (in paragraph 7 of its opinion):

“ It appears from the caselaw that parties may cohabit within the meaning of the Family Law Act when one party is still legally married to another. In *Sullivan v. Letnik* [\(1994\), 5 R.F.L. \(4th\) 313](#) (Ont U.F.C.) Beckett found:

I am of the opinion that the parties cohabited in a conjugal relationship after June 2<sup>nd</sup>, 1981, and certainly since January 2<sup>nd</sup> of 1985 when the applicant and her husband formally separated. The relationship was continuous from that time until March 1992.”

<sup>98</sup> [1998] R.F.L. (4<sup>th</sup>) 361 (Ont. Gen. Div.) The quoted language is in paragraph 26.

love nest -- a boat called the *Jardin* - "because of the business turmoil between them and her fear of violence." The court noted:

"that did not mean that the relationship had terminated. \* \* \* Whether couples are separated is a question of intent, not geography; at least one of the parties must intend to permanently sever the relationship."<sup>99</sup>

Ontario law on these matters is mendacious. To call Mrs. Sullivan the spouse of Mr. Letnik and to call Ms. Mahoney the spouse of her lover is contrary to social fact. Ontario law can also be convicted of disrespect. It manifests an uncaring attitude to identify Mrs. Sullivan as the spouse of someone she has never married and whom she is episodically loathe even to approach.

The fluidity of Ontario law as to the definition of "spouse" embarrasses doctrinal development on related matters. In *Rosenberg v. College of Physicians & Surgeons*, a physician whose license was revoked owing to his having had sexual relations with a patient advanced as a defense the assertion that the patient was also his spouse. The prohibition was limited by no express spousal exception, but common sense might demand that one be inferred.<sup>100</sup> Surely the drafters did not intend to prohibit sexual relations between husband and wife.<sup>101</sup> Dr. Rosenberg's patient, however, was not his wife. Dr. Rosenberg maintained, rather, that she was his "spouse" owing to cohabitation. The court rejected Dr. Rosenberg's argument and refused to infer the proposed spousal exception on the grounds that "the term 'spouse' has no clear definition in law," and that "'spousal relationship' means one thing in one context and something quite different in another"<sup>102</sup> and that as a result such an exception would "open a

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<sup>99</sup> See also *Stephen v. Stawecki*, [2006] 32 R.F.L. (6<sup>th</sup>) 282 (Ont. C. A.), affirming [2005] 32 R.F.L. (6<sup>th</sup>) 273 (Ont. Sup. Ct. J.); *Sturgess v. Shaw* (2002), 31 R.F.L. 5<sup>th</sup> 453 (Ont. Sup. Ct. J.); *Mahoney v. King*, [1998] R.F.L. (4<sup>th</sup>) 361 paragraph 9 (Ont. Gen. Div.) ("parties may be found to be cohabiting, even if they maintain separate residences.").

A further point about the Ontario definition of "spouse" is that by its terms it applies only to Part Three of the act ("Support Obligations"). The term "spouse" is extensively used throughout the act (as of course are terms which would normally be cognates, such as marriage, family, and so on), but outside of Part Three "spouse" is not within the extended definition quoted above. It seems you may be a spouse for some purposes but not necessarily for others under Ontario law.

<sup>100</sup> *Rosenberg v. College of Physicians and Surgeons of Ontario* (2006), 216 O.A.C. 358, 2006 CarswellOnt 6759 (Ont. C. A.).

<sup>101</sup> Even "touching of a sexual nature" and "behaviour or remarks of a sexual nature" were prohibited. *Id.* paragraph 6.

<sup>102</sup> *Id.* paragraph 40. The court attached an appendix which charted the varying definitions under twenty-six Ontario statutes and regulations.

significant hole” in the disciplinary requirements.<sup>103</sup> After this decision, it remained unclear whether a physician in Ontario who afforded medical treatment to his wife or her husband might also engage in marital sexual relations.

*C. The Status of the Parties to a Marriage  
which One Spouse Seeks to Dissolve on a No-Fault Basis.*

No-fault divorce presents difficult problems. The analysis depends in major part on the nature of the no-fault law and on the understanding of marriage and divorce which obtains between the parties and within their society. The matter can be illustrated with two narratives. (Likely most cases in contemporary America fall somewhere between them.).

*Case One.* – Wally and Wendy are citizens of a country in northwestern Europe which has statutorily recognized unilateral no-fault divorce for decades, and whose social order concurs in an understanding that if a couple is incompatible, or if either of the spouses is dissatisfied, to divorce is the reasonable course of action. The law (and social opinion) minimize post-dissolution obligations (there is no alimony; needy ex-spouses are cared for through the social services system). Wally and Wendy are not much different in opinion and practice from most members of their society (they are not, for example, members of a religious group which teaches divergently on these matters). They were married in a civil ceremony which included no oath. After three years of marriage, Wendy decided she was bored and petitioned for divorce. Wally objected, but the magistrate granted the petition.

Is the magistrate guilty of mendacity or disrespect? He may have said nothing except that the couple is now divorced. “Divorced” is a legal term. It is also a term with a social meaning, but the social meaning leans heavily on the legal definition. Perhaps the magistrate has also stated that Wally and Wendy “are free to go their own ways” and that their “special obligations to one another are at an end.” Those statements are not in conflict with the beliefs of that society.

What about looking beyond social morality to considerations of basic nonpositive good? The magistrate might be criticized on such grounds,

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<sup>103</sup> *Id.* paragraph 42 (characterizing the reasoning of the disciplinary committee). The court did leave open the possibility that some exception along those lines might later be identified, stating that “the legislation may leave some scope for finding that the [medical-disciplinary] . . . regime does not apply to certain relationships.” *Id.* paragraph 44.

especially if he went further and stated that marriage is an institution that can be dissolved *ad libitem*, leaving the parties in the same moral situation as had they never married in the first place. Wally's and Wendy's society's social morality and positive law are at variance with nonpositive normativity,<sup>104</sup> and the conflict may be of the intractable sort identified and briefly discussed in section IV B 4, *supra*.

Did we mention that Wally and Wendy have three young children? The divorce is likely to be a disaster for them and for their children's children, as extensive social science research has come to establish. This suggests obvious consequentialist arguments, and arguments based on considerations of justice, to deplore what Wendy has brought about and to encourage reform of the no-fault system. Principles of veracity and respect suggest that the magistrate ought at least to introduce these considerations into the discussion.

*Case Two.* – Henry and Winona are citizens of a country whose society has always endorsed an understanding of marriage as strongly obligatory, presumptively indissoluble, and terminable by divorce only on limited grounds such as violence and adultery. The law (and social opinion) insist that some of the obligations of marriage survive even divorce: obligations of support, for example, and even personal ex- to ex- visitation. Henry and Winona wedded in a customary ceremony which included an oath of loyalty “‘til death do us part,” and through the second year of their marriage adhered in practice and belief to their society's accepted views.

During their third marital year Henry became restless and dissatisfied and petitioned for divorce. Bringing his petition before a family-law judge who considered himself to be a progressive on marital matters, Henry obtained a decree of dissolution without establishing any of the recognized grounds. Here are some of the passages from the judge's decree:

“[M]arriage today is a home for the heart: entering, furnishing, and exiting that home is your business alone. Today's marriage – from whatever angle you look – is justified by the happiness of the pair.’<sup>105</sup> It is therefore appropriate that this court recognize, on the basis of

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<sup>104</sup> The ethical bases for this assertion are presented in earlier works by the author of this Article: *The Principles of Justice in Procreative Affiliations*, in WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 125 (Lynn Wardle, ed., 2008); *Marriage and the Ethics of Office*, 18 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 89 (2004), and *Marriage and the Good of Obligation*, 47 AMERICAN J. JURISPRUDENCE 41 (2002).

<sup>105</sup> E.J. GRAFF, WHAT IS MARRIAGE FOR? 251 (2004).



fundamental fairness and the protection of liberty guaranteed by this country's constitution, that divorce is available when a marriage has irreparably broken down.

“This necessarily subjective standard is satisfied whenever, as an American authority puts it, one of the parties ‘feels that the marriage cannot be salvaged.’ It is enough that petitioner ‘sincerely believes that the marriage has irreparably broken down.’<sup>106</sup>

“In this case, Petitioner has attested that he has those feelings. Based on this, we conclude that the relationship between him and Respondent no longer really is a marriage at all, the essential features of that relationship being absent. For some time Henry and Winona have been, and – as we now decree -- they henceforth are, free of any obligations to one another and are single persons.”

This decree violates requirements of veracity and respect.

That this is the case as regards its specificities should be obvious. That this is so in a more basic way can be discerned as well. It contradicts not only the doctrines about marriage endorsed by the society in question but also the principles – principles of fidelity and lasting obligation – which that society embraces, and which it uses as the basis for the recognition of marriage. The judge's opinion substitutes an ethic of pleasure and impulse.

The opinion here displays characteristics similar to those manifested in the shameful statements of Magistrate Lewis in the passage quoted at the outset of this Article. This judge has likened the parties, and indeed has likened all married couples, to little dogs.

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<sup>106</sup> Caffyn v. Caffyn, 441 Mass. 487, 494 n. 16, 806 N.E.2d 415, 422 n.16 (2004)(emphasis added)(quoting Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1319, 1322-1323 (1970). The terms within the single quotes above are from this comment as quoted in *Caffyn* opinion, except that the word “feels’ is in the *Caffyn* opinion but not, at that point, in the comment.).