Law and Lies

An Introduction

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A lie cannot live.

Martin Luther King, speech in Montgomery, AL, 1965

It is necessary to the happiness of man that he be mentally faithful to himself. Infidelity does not consist in believing, or in disbelieving, it consists in professing to believe what he does not believe.

Thomas Paine, *The Age of Reason*

[W]hen we talk about lying, and especially about lying among acting men, let us remember that the lie did not creep into politics by some accident of human sinfulness. Moral outrage, for this reason alone, is not likely to make it disappear .... Lies are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear.

Hannah Arendt, "Lying in Politics" in *Crises of the Republic* (1972)

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Introduction

Law has a strangely complicated relationship to lies, deception, and truth. Sometimes law takes a hard line on behalf of truth, "the truth, the whole truth, and nothing but the truth," but more often the law looks the other way as lies are told. It tolerates deception, and regards truth as an inconvenient barrier to the attainment of some other value. The American legal system embraces a utilitarian view of lying rather than a strictly Kantian prohibition.[1]

Legal actors sometimes practice deception, if not outright lying, in the service of catching criminals, here we think of the use of undercover agents, and sometimes law forgives lies to those who enforce the law, as in the doctrine of the "exculpatory no."[2] Indeed, law sometimes seems to encourage, if not demand, deception. Here think of "Don't Ask, Don't Tell." Moreover drawing the line between legally tolerated deceptive practices and fraud has proven to be notoriously difficult.[3]

[1] Contrast Immanuel Kant, "On a Supposed Right to Lie From Altruistic Motives," in *Critique of Practical Reason*, ed. Lewis White Beck (Chicago: University of Chicago Press, 1985), 346–350; and Henry Sidgwick, "The Classification of Duties-Veracity," in *The Methods of Ethics*, 7th ed. (London: MacMillan and Co., 1913), 312–319.

[2] See *People v. Brooks*, 51 Ill. App. 3d 800, 1977.

[3] Arthur A. Leff, *Swindling and Selling: The Story of Legal and Illegal Con-games* (New York: Free Press, 1976).

There have been several book-length treatments of lying as a moral, social and/or psychological phenomenon.[4] However, this book is the first to explore lying in and around law. While the subject of law and lies is broad in scope, by way of introduction I offer a few illustrations of the way law deals with and responds to lies and deception.

Lying and the First Amendment

One of the domains in which law's complicated relationship to lies and deception is vividly on display is in the context of the Constitution's First Amendment guarantee of free speech. In a landmark decision in the mid-twentieth century, the Supreme Court took up the question of constitutional protection afforded false statements in and by the media. In *New York Times Co. v. Sullivan*, the city commissioner of Montgomery, Alabama, a man named L. B. Sullivan, filed a libel action against the *New York Times* and four black ministers responsible for a full-page advertisement in the *Times*, which alleged that the arrest of Rev. Martin Luther King Jr. for perjury in Alabama was retaliation for King's efforts to mobilize black voters. The advertisement also included statements about police action against students participating in civil rights demonstrations, some of which were false.

[4] See, for example, Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Random House LLC, 2011); Charles V. Ford, *Lies! Lies!! Lies!!!: The Psychology of Deceit* (New York: American Psychiatric Pub, 1999).

Under Alabama law a publication was libelous *per se* if it was intended to injure a person's reputation or bring that person into public contempt. Once libel *per se* was established, the sole available defense required showing that all statements were entirely factually correct; in this case, however, the advertisements did include minor errors. As a result, the jury found the defendants guilty of libel without any demonstration of malice or material damages to the plaintiff. Alabama's Supreme Court upheld the verdict.

The United States Supreme Court, however, reversed this ruling and expanded constitutional protection for false speech. The Court's unanimous decision stated that "Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless 'actual malice' – knowledge that statements are false or in reckless disregard of the truth – is alleged and proved."[5] This requirement of "actual malice" serves to protect the "erroneous statement (that are) inevitable in free debate."[6] In *New York Times v. Sullivan*, falsehoods were protected in the interest of protecting freedom of the press.

Ten years after *New York Times v. Sullivan*, the Court limited protection of false speech, making a distinction between lies about a public figure and lies about a private individual. In this 1974 case, *Gertz v. Robert Welch*, the majority stated that, because private citizens have access

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[6] Id.

to fewer ways of counteracting allegations, "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[7]

Recognizing the importance of protecting unpopular opinions from undue prosecutions the Court barred states from imposing a "strict liability" standard for defamation. This ruling allowed states latitude in creating their own libel laws for private individuals, while simultaneously holding that "[u]nder the First Amendment there is no such thing as a false idea." Here again the Court protected "some falsehood in order to protect speech that matters."[8]

Though the decisions in both *New York Times Co.* and *Gertz* centered on falsehoods, neither directly addressed whether or not deceptive, untrue statements (whether malicious or unintentional) comprise a constitutionally protected category of speech. The Court recently took up this question in the context of a Congressional statute, the so called Stolen Valor Act, which imposed criminal penalties on false claims of military honor. The key section of the act reads as follows:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette

[7] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
[8] Id.

> of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.[9]

In *United States v. Alvarez*, Xavier Alvarez, of Pomona, California, challenged the constitutionality of the Stolen Valor Act after he who was charged for falsely saying, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."[10] He was subsequently "sentenced to three years on probation, ordered to do 416 hours of community service, and fined 5,000."[11]

Alvarez appealed to the Ninth Circuit Court of Appeals and won. That Court, in a divided 2–1 ruling, struck down the Stolen Valor Act. The majority held that there was "no authority holding that false factual speech, as a general category unto itself, is among . . . those classes of speech which can be prohibited without any constitutional problem."[12] The Court found that the law did not require prosecutors to show that the defendant had acted with "actual malice," intended to cause injury and his lie had done harm to the reputation of the distinction. Without these provisions, the Stolen Valor Act was, the Ninth Circuit ruled, unconstitutional.[13]

[9] H.R. 3352.
[10] *United States v. Alvarez*, 567 U.S. ___ (2012).
[11] Id.
[12] Id.
[13] *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010).

The government appealed this decision to the Supreme Court, arguing that false statements of fact are only constitutionally protected when they are "derivative" of the truthful speech that the Amendment is designed to protect.[14] Arguing that false speech does not enjoy the same level of constitutional protection as truthful utterances, the government asserted that "strict scrutiny"[15] is not warranted for those laws that restrict false speech. The government contended that the Stolen Valor Act was constitutional insofar as it outlawed only objective falsehoods, a category of speech that was already unprotected by the First Amendment.

The Supreme Court rejected the government's contention and held that the First Amendment protects lies and deceptive speech, striking down the Stolen Valor Act in a 6–3 decision. Justice Kennedy announced the judgment of the Court "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected."[16] The Court held that "isolated statements in some earlier decisions do not support the

[14] For example, a misstated scientific fact would be protected because falsity is inevitable as science is advanced through debate and discovery.

[15] "Strict Scrutiny" is the most stringent standard of judicial review used by U.S. courts to weigh the government's interests against a constitutional right or principal. To pass the test the law must (1) be justified by a compelling governmental interest, (2) be narrowly tailored, and (3) be the least restrictive means necessary for achieving the interest.

[16] Id., Kennedy's opinion.

Government's submission that false statements, as a general rule, are beyond constitutional protection."[17] False statements, Kennedy argued, are a category of protected speech; therefore, any legislation that seeks to regulate them is subject to "strict scrutiny," a standard under which the Stolen Valor Act failed.

Dissenting, Justice Alito contended that false statements are, as a category, not protected by the First Amendment. Alito wrote, "By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[18] He argued that "[t]he lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection." Falsehoods, Alito observed, should only be protected insofar as their regulation could have a "chilling effect" on free discourse.[19]

From *New York Times* to *Alvarez* the Supreme Court has given wide latitude for lies and deception. Law tolerates lies and deception as part of its embrace of robust freedom of expression. As Kennedy's *Alvarez* opinion noted, the categorical protection of lies "comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression

[17] Id.
[18] *United States v. Alvarez,* 567 U.S. ___ (2012).
[19] Id.

of views in public and private conversation and expression the First Amendment seeks to guarantee."[20]

Perjury and Fraud

Another area in which law's attitude toward lies and deception is on display is in the context of perjury and fraud. In comparison to the contested principles intrinsic to lying and the First Amendment, lying in the context of perjury and fraud seem easier cases. Here the causal relationship between the lie and the damage it creates would appear uncontroversial: a lie told on the witness stand, or to gain material advantage, seems clearly injurious. However, both areas become more complex as statutes with relatively straightforward tenets are applied to the complex world of human interactions.

The most often prosecuted U.S. perjury statute, 18 USC § 1623,[21] states:

> Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as

[20] Id.

[21] Congress enacted 18 U.S. Code § 1623 to avoid some of the common-law technicalities that developed over the lifetime of the older perjury statute 18 U.S. Code § 1621. When congress passed 1623 it did not repeal 1621, the government can choose the statue that it will prosecute under. Because 1623 outlaws a broader scope of perjury than 1621 and is freed of the many of the common-law requirements, almost all perjury cases are tried under 1623. See Charles Doyle, "Perjury Under Federal Law: A Brief Overview," *Congressional Research Service Report for Congress* (11.5.10).

> permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

To prove perjury, "the Government must establish that the defendant (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States."[22]

Typically, the third point – "materiality" – is the most ambiguous aspect of a perjury prosecution. Information is usually considered material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed."[23] This limits the scope of prosecutable lies to those that could affect the outcome of the case. Lying on the stand about unrelated or digressive matters, for instance, cannot be prosecuted as perjury.

The second criterion for perjury – falsity – has also been a point of legal contention. In *Bronston v. United States*, the Supreme Court ruled that only *patently* false statements could be prosecuted. "It may well be that petitioner's answers were not guileless but were shrewdly calculated to

[22] Id., at 6.
[23] *Kungys v. United States*, 485 U.S. 759 (1988).