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## THE CRIMINALIZATION OF LYING: UNDER WHAT CIRCUMSTANCES, IF ANY, SHOULD LIES BE MADE CRIMINAL?

BRYAN H. DRUZIN\* & JESSICA LI\*\*

*This Article argues that lying should be a crime. In doing so, we propose the creation of a wholly new category of crime, which we term “egregious lying causing serious harm.” The Article has two broad objectives: the first is to make the case why such a crime should even exist, and the second is to flesh out how this crime might be constructed. The main contribution of the Article lies in the radical nature of its stated aim: the outright criminalization of certain kinds of lies. To our knowledge, such a proposal has not previously been made. The analysis also contributes to a broader discussion regarding the issue of overcriminalization. We conclude that while criminalizing certain forms of lies might at first blush appear fanciful, the case for doing so is not only plausible, it is indeed necessary.*

### I. INTRODUCTION

Imagine you are a resident in an apartment complex. Your neighbor (call him Bartley) knocks on your door one day and informs you that your infant child has been crushed to death by the elevator on the first floor. Gripped with fear, you rush downstairs in a state of frenzied panic, your heart pounding in your chest, only to discover that the nightmare described by Bartley is a work of fiction. Your child is fine. What Bartley just told you was a lie designed to terrorize you. Suppose Bartley repeatedly does this to people, deriving some perverse pleasure from it. The question this Article will pose is a simple one: should Bartley’s conduct be a crime? The answer this Article puts forth is “yes.” The above example, exaggerated as it is, will serve as the focal point of the discussion which follows, as we

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assert that while this scenario may give rise to certain tortious liability (i.e., the tort of intentional infliction of emotional distress<sup>1</sup>), Bartley's conduct, in that it causes serious harm, should receive the full attention and sanction of the criminal law. What Bartley did should be a crime—and yet it is presently not a crime.

There is a long-standing and powerful moral principle that maintains that lying is wrongful conduct. It should not be too controversial of an assertion to state that all well-socialized people revere honesty and disapprove of lying and other forms of deception.<sup>2</sup> And yet, it is also a truism that everyone lies. Dishonesty appears to be a pervasive feature of human interaction. The average person does not kill, rob, or rape, but she does lie, and she lies often. Friends lie to friends to be polite; students lie to their professors about missed assignments; husbands lie to their wives about their whereabouts when in fact they are having affairs; teenagers lie to their parents about the friends they keep; we even lie that we feel fine when we do not. Our relatives lie; our co-workers lie—and we lie to them. And so while the reader's immediate reaction to Bartley's behavior is likely revulsion and a sense that he deserves some form of punishment, we may yet remain uneasy with the notion of criminalizing Bartley's conduct. This mismatch between the ethical prohibition against lying and the criminal law's general reluctance to sanction such conduct will be the central focus of the paper as we attempt to negotiate a distinct set of circumstances where lying should in fact be criminalized. This Article does not assert that all lies should be criminalized; rather it proposes that certain lies in certain circumstances should be made criminal—lies which are explicitly intended to cause uniquely serious harm, and where such harm results.

Indeed, we can envision many other scenarios involving lying that do not have any tort equivalent, whereby "serious harm" may go beyond physical or mental distress to include loss of opportunity, loss of liberty, or other less easily defined injuries. For instance, consider a scenario in which an individual maliciously lies to an orphaned child that her parents, whom the individual knows, are deceased, when in fact they are alive and desperately searching for the child.<sup>3</sup> What is the crime exactly? Consider a

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<sup>1</sup> The basic elements of which are: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the act is the cause of the distress; and (4) the plaintiff suffers severe emotional distress as a result of the defendant's conduct. *See Wilkinson v. Downton*, (1897) 2 Q.B. 57; *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (Outrageous Conduct Causing Severe Emotional Distress).

<sup>2</sup> Note that "lying" and "deception" are used interchangeably in the first portion of this Article. There are, however, distinct differences between the two forms of behavior and this will be explained in greater detail in the latter half of the Article.

<sup>3</sup> We assume the individual owes no duty of care to the child.

situation where a woman deceives her lover into impregnating her by lying to him regarding her use of birth control. This man involuntarily fathers a child as a result. Imagine the situation is reversed and the woman is involuntarily impregnated. What is the harm? What of a woman who falsely claims to have had sexual relations with a man solely to destroy his marriage and family?<sup>4</sup> Does not a very serious harm result from this lie? Consider a scenario in which an individual jealously conceals her roommate's admissions letters to medical schools, telling the roommate instead she was rejected from all the schools to which she had applied.<sup>5</sup> In fact, one can conceive of many scenarios in which lies cause considerable injury that existing laws simply fail to capture, or capture improperly. There is little question that such harms do occur, and quite likely occur frequently; however, as they are not criminalized nor have produced any body of case law, these incidents go unnoted and unpunished.

While the idea of criminalizing lying may seem at first blush somewhat radical, it is not so far-fetched when we consider that lying is already criminalized in many contexts, such as perjury, criminal libel, and the making of false statements. This Article asserts that it would in fact be logically inconsistent to not extend this same proscription to circumstances involving the exact same conduct causing an equal or greater measure of harm. This Article will argue the case for criminalizing lying in certain exceptional circumstances that are not presently captured by our criminal law. But these are, the reader might object, private interactions that should remain beyond the purview of our laws. To criminalize such behavior, the reader may protest, would be an unacceptable, and perhaps even dangerous intrusion into the private sphere. There may be a great deal of validity to this objection. Indeed, there may be strong public policy reasons against criminalizing lying; however, there are also, as we will show in the discussion that follows, compelling reasons to extend the law to such conduct. The present inability of the law to protect individuals from such harms does not justify its failure to do so, nor imply that the criminal law

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<sup>4</sup> This is not a crime in the United States. While there may be an action in defamation in this case, it is highly unlikely that such a scenario would give rise to criminal defamation. *See infra* subsection II.B.1.c (“Defamation”). If the genders in our scenario were reversed this could be a misdemeanor, for instance, under an archaic Floridian law. *See* FLA. STAT. § 836.04 (2010) (“Whoever speaks of and concerning any woman, married or unmarried, falsely and maliciously imputing to her a want of chastity, shall be guilty of a misdemeanor of the first degree . . .”). However, this would entail a punishment hardly commensurate with this level of harm.

<sup>5</sup> The individual might be charged with obstructing her roommate's mail, a class B misdemeanor punishable by a fine or up to six months imprisonment, 18 U.S.C. § 1701 (2006), but such a reprimand does not really redress the harm, nor is it an appropriate label for her conduct.

should sit on its hands and not criminalize such objectionable and injurious conduct. This Article will advocate for the criminalization of certain exceedingly egregious forms of lying. In doing so, we will propose the creation of a wholly new category of crime, which we will call: “egregious lying causing serious harm.” The Article has two broad objectives: the first is to make the case why such a crime should even exist, and the second is to flesh out how this crime might be constructed.

To do so, we will borrow some key concepts proposed by the political theorist Joel Feinberg. An examination of Feinberg’s principle of “mediating maxims” will demonstrate that the crime conceived of in this paper does not just broadly violate his “harm principle,” but fulfills the parameters as set out by Feinberg of the kind of conduct that the state may rightly make criminal.<sup>6</sup> The contribution of this Article lies in the radical nature of its stated aim: the outright criminalization of certain kinds of lies. To our knowledge, such a proposal has not previously been made. If by the conclusion of the discussion the case for criminalizing lying appears at least conceptually plausible, then the aim of this paper will have been met.

The Article proceeds in two parts. Part II examines how and indeed *if* lying is an intrinsic wrong, and assesses the arguments offered by moral philosophers. The notion of criminalizing lying should not be such a great affront to our sensibilities as lying is already regulated to varying degrees in both criminal law and tort, along with other areas of the law. A summary of this law is provided. There are very compelling reasons as to why the criminal law has been reluctant to extend its coverage and protection to victims of lying; these arguments are also assessed. Part III then advances the proposition that the criminalization of lying may indeed be justified in certain narrow contexts. The second half forms the meat of the Article. Here we construct a wholly new crime, fleshing out its elements and teasing out the implications of what most likely will be received as a somewhat radical proposal. Indeed, the criminalization of certain forms of lies might initially appear fanciful, but it is the aim of this Article to not only establish the plausibility of this position, but to argue the necessity of legislatively constructing such a crime.

## II. WHY CERTAIN FORMS OF LIES SHOULD BE CRIMINALIZED: THE LAW’S PRESENT APPROACH TO LYING

### A. THE MORAL DIMENSIONS TO LYING

We choose an intuitive place to begin our discussion: the idea that it is wrong to lie—the refrain of every scolding mother and perhaps the first

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<sup>6</sup> See *infra* section II.A.3.

moral truth learned by each of us as a child. To properly contextualize our subject, we must begin by examining its moral dimensions. For this, some preliminary mapping of the philosophical landscape underpinning lying is required. Let us start by first defining what it is exactly we mean by a lie. Philosopher Arnold Isenberg has proffered a definition of a lie that will serve the purpose of this Article. His definition of a lie is “a statement made by one who does not believe it with the intention that someone else shall be led to believe it.”<sup>7</sup> While lying is widely condemned as wrong, the reasoning behind this moral prohibition differs dramatically. Leading arguments contend that lying is either an absolute wrong in itself, or that the harm that it engenders is severe enough as to warrant its prohibition. These divergent views are represented by the two warring camps of deontology and consequentialism: the first focuses upon the act itself; the latter, the consequences that flow from the act.<sup>8</sup> Thus, deontology would hold that lying is inherently wrong, while consequentialism would say that lying is wrong because of its harmful consequences.

There are even more finely nuanced approaches to criminalization that we could very well examine: ones rooted in libertarianism, economic

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<sup>7</sup> Arnold Isenberg, *Deontology and the Ethics of Lying*, 24 PHIL. & PHENOMENOLOGICAL RES. 463, 466 (1964). Interestingly, Isenberg goes on to assert that the preconceived notion that a liar necessarily intends to deceive the listener is erroneous; that is, one may lie without wishing to be deceptive towards the listener. The intention on the part of the speaker is essential. If the speaker lacks the intention to make another believe what he does not believe himself, he is not lying. So, for example, a mistaken utterance is not a lie and the utterance of a statement that the speaker *knows* to be false need not be a lie if the speaker is aware that the addressee is of sound intelligence and would not believe the statement—the use of sarcasm might be an example of this. *Id.* For those of a more ecclesiastical bent, St. Augustine offers a similar definition: “saying of what one knows to be false in order to deceive.” RANDAL MARLIN, PROPAGANDA AND THE ETHICS OF PERSUASION 142 (2002). Other prominent names have proffered definitions. Immanuel Kant defines a lie as “an intentional untruthful declaration to another person.” SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 286 (1979). Benjamin Constant and Hugo Grotius argue that a lie should be defined as “an intentional untruthful declaration to another person *who has the right to the truth.*” Joseph Betz, *Sissela Bok on the Analogy of Deception and Violence*, 19 J. VALUE INQUIRY 217, 217 (1985).

<sup>8</sup> In short, deontology is the belief that “there are certain acts that are wrong in themselves.” KASPER LIPPERT-RASMUSSEN, DEONTOLOGY, RESPONSIBILITY, AND EQUALITY 15 (2005). Deontology is perhaps best understood in contrast to consequentialism, the theoretical underpinning to utilitarianism, which holds that what is “morally right or wrong to do depends upon what would bring about the best consequences . . . . Moral values, consequentialists believe, are ultimately instrumental, consisting in the promotion of values that, because they are prior to morality, are ‘nonmoral.’” STEPHEN L. DARWALL, DEONTOLOGY 1 (2003). Deontologists believe that certain acts are categorically wrong irrespective of their consequences. Perhaps the most well-known advocate of this position is Immanuel Kant, discussed *infra*.

analysis, utilitarianism, and contractarianism, for instance.<sup>9</sup> However, these theories, as different as they are, ultimately adhere to, and are subsumed by what is either a deontological or consequentialist position. Thus we will concern ourselves here simply with these two broad conceptual approaches. We should make it clear from the outset that this Article vigorously rejects the first and embraces the second. The thesis of this Article—the criminalization of lying—is not rooted in any kind of deontological view of lying as implicitly wrong; rather, the argument which follows hinges entirely upon the harm that certain lies produce. Before rejecting the deontological position outright, however, let us look at it briefly; indeed, to understand something, it often helps to first understand clearly what it is not.

### *1. Augustine, Aquinas, and Kant*

The strictest deontological theories hold that lying is an intrinsic wrong. Both “St. Augustine and St. Thomas Aquinas, inspired by Aristotle, maintained that lying is contrary to the laws of nature.”<sup>10</sup> According to them, motive and consequence aside, to assert what one does not believe is inescapably sinful.<sup>11</sup> Immanuel Kant famously held that lying, defined as a false assertion, is absolutely wrong under all circumstances.<sup>12</sup> In his view, the liar “throws away and, as it were, annihilates his dignity as a human being.”<sup>13</sup> Lying constitutes an offense to all of humanity and perhaps more importantly, it defiles the liar herself. Kant gave the famous example of a murderer asking for the whereabouts of his intended victim. In Kant’s view, even in such extreme circumstances, it would be wrong to lie. If forced to answer the question, one should reveal the whereabouts of the victim, as lying to the murderer would be categorically wrong.<sup>14</sup> This is indeed a somewhat startling conclusion, but Kant’s point is clear.

### *2. Other Deontological Arguments: Hobbes and Rawls*

Some scholars have put forward an inventive linguistic argument against lying: since by definition, an assertion implies truth, the utterance of

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<sup>9</sup> For a good analysis of two of these approaches to criminalization, economic analysis and utilitarianism (as well as legal moralism), see DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 180–205 (2008).

<sup>10</sup> Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 *LAW & PHIL.* 393, 396 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 182 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797).

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

<sup>14</sup> Alexander & Sherwin, *supra* note 10, at 397.

a lie violates a universal and constitutive rule of language use and hence is always wrong.<sup>15</sup> Other lines of argument locate the wrong of lying in the assault that it perpetrates on the victim's autonomy. This follows from the notion that a lie distorts the reasoning process of the victim, interfering with her rational deliberation; the lie robs one of her ability to make rational choices concerning her beliefs and course of conduct—it is an assault on her integrity as an individual.<sup>16</sup> The victim's will and actions are displaced and manipulated according to the speaker's ends.<sup>17</sup> This level of interference "is presumptively wrong in ways that cannot be rebutted by considerations of personal gain."<sup>18</sup>

Central to this deontological concern with autonomy is the notion of voluntariness.<sup>19</sup> For instance, consider a lie regarding the contents of a liquid that A tells B to serve to C, say a glass of wine. A knows that the wine contains a poison but tells B that it is fine and insists that he serve it to C. B may poison his guest, but does not do so voluntarily. A's lie thus renders B's action involuntary.<sup>20</sup> In this context, the liar demonstrates no respect for the victim's capacity for self-governance. This line of argument is often attributed to Kant and has been developed further by several Kantians. These scholars do not offer many exceptions to the principle that lying is wrong, save on paternalistic grounds (it is in the best interests of the person who is lied to) or where a lie may be used to defend the innocent.<sup>21</sup> In this view then, the false belief generated by the lie is the harm itself, and no further effects beyond this such as a victim suffering are required.

Yet another strand of argument asserts there is a duty of fair play that cannot go ignored since we all, to a certain extent, depend on others to tell the truth.<sup>22</sup> This fair play duty has its origins in Hobbes's conception of the social contract and was more recently articulated by the political philosopher John Rawls:

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<sup>15</sup> *Id.*

<sup>16</sup> See Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1546 (1998).

<sup>17</sup> See Alexander & Sherwin, *supra* note 10, at 397.

<sup>18</sup> Strudler, *supra* note 16, at 1546.

<sup>19</sup> *See id.*

<sup>20</sup> It may be reasoned that it is primarily lies that successfully convince their victims that actually undercut voluntariness; unsuccessful attempts at lying, where the intended victim does not believe the liar, will generally fail to undermine autonomy. *See id.* at 1548.

<sup>21</sup> *See id.* at 1546–47. Some autonomy theorists reluctantly embrace the idea that lying may be justifiable in certain circumstances such as the situation whereby one protects one's friend from devastating news in order to ensure that they do not, for example, suffer from a heart attack. *Id.* at 1547.

<sup>22</sup> *See id.* at 1557–58.

Suppose . . . that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating.<sup>23</sup>

And so in a society where the vast majority have the proclivity to tell the truth, liars become free-riders as they can elect to benefit from their lies at the most optimal times. This line of argument hones in on the harm that lies cause to society writ large in that they sever the vital network of trust that supports human interaction.<sup>24</sup>

### 3. Mill, Feinberg, and the Harm Principle

This brings us at last to the consequentialist camp. From a utilitarian perspective, John Stuart Mill argued that lies undermine mutual trust, the lack of which “does more than any one thing that can be named to keep back civilization, virtue, everything on which human happiness on the largest scale depends.”<sup>25</sup> Mill offers a consequentialist argument; his emphasis rests upon the larger consequences of the conduct. Mill held that a general prohibition against lies, subject to a few narrow and well-defined exceptions, would best serve the purpose of utility.<sup>26</sup> Underpinning Mill’s utterance here is his famous harm principle: “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>27</sup> Feinberg further develops this principle in his rejection of “legal paternalism” and “legal moralism” as sufficient grounds for criminalizing behavior.<sup>28</sup> Feinberg’s work is particularly important for us as he further refined Mill’s harm principle, interpreting the principle in a more nuanced fashion by differentiating different types of harms so as to identify the boundaries within which the criminal law may legitimately apply. Feinberg’s work plays an important role in providing the necessary parameters with which to frame the crime of egregious lying. We return again to Feinberg later in the discussion when undertaking the task of identifying the degree of harm that may justify criminal sanctions. The idea of harm as the basic justification

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<sup>23</sup> John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 10 (Sidney Hook ed., 1964).

<sup>24</sup> See Alexander & Sherwin, *supra* note 10, at 398.

<sup>25</sup> JOHN STUART MILL, *UTILITARIANISM* (1869), reprinted in *UTILITARIANISM AND ON LIBERTY* 181, 199 (Mary Warnock ed., 2d ed. 2003).

<sup>26</sup> Alexander & Sherwin, *supra* note 10, at 399.

<sup>27</sup> JOHN STUART MILL, *ON LIBERTY* 6 (Bobbs-Merrill 1956) (1859).

<sup>28</sup> See JOEL FEINBERG, *HARM TO SELF* (1986); JOEL FEINBERG, *HARMLESS WRONGDOING* (1988).

for the law's intrusion into the private lives of individuals forms the foundation of the present exposition.<sup>29</sup>

With the clear exception of Mill, the arguments highlighted above hew more or less to a deontological position in that they focus primarily upon the inherent immoral nature of lying. They are respectable arguments; however, this Article is not at all concerned with them. The argument presented in this Article is far more pragmatic; while recognizing the value of these deontological claims, our thesis is not tied up with any implicit moral condemnation of lying. Rather, this Article sits squarely in the consequentialist camp. As such, the argument that follows is framed in relation to the harm produced by the act. Our objective in targeting lies per se is not predicated upon any deontological claim to morality, rather it is simply to limit the harm that may result from the act—it is not to stamp out lies because they are unethical, but merely to deter the more egregious forms of it for the protection of individuals and the greater welfare of society. This theoretical tack is important, as it will influence how the crime of egregious lying is constructed in terms of the elements of the crime and so forth.

The sense that certain acts possess an implicit moral nature is likely triggered by witnessing the harm associated with these actions, which then elicits the internalization of certain normative perceptions regarding these acts. We imbue the act with an intrinsic moral nature, eventually giving rise to a deontological-like perception.<sup>30</sup> Indeed, this process likely has its roots deep in evolution.<sup>31</sup> Pre-rational internalization of this kind provides a distinct survival advantage in terms of socialization and group cooperation, as intuitive associations are more practical and efficient than

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<sup>29</sup> Besides Mill and Feinberg, for useful discussions of whether the immorality of conduct is a necessary condition for its criminal prohibition, see generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1968); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); MICHAEL S. MOORE, *PLACING BLAME* (1997); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); JONATHAN SCHONSHECK, *ON CRIMINALIZATION* (1994); Larry Alexander, *Harm, Offense, and Morality*, 7 *CAN. J.L. & JURIS.* 199 (1994).

<sup>30</sup> See Bryan Druzin, *Law, Selfishness, and Signals: An Expansion of Posner's Signaling Theory of Social Norms*, 24 *CAN. J.L. & JURIS.* (forthcoming Spring 2011) (explaining normative internalization as an adaptive quality).

<sup>31</sup> This may explain why certain complicated commercial wrongs that may give rise to actions in tort are not readily perceived as having an inherently criminal, immoral element to them although the harm produced may be equal to or even greater than many crimes. And conversely, this may also account for why certain crimes, such as tax evasion or white collar fraud, do not carry the appropriate feeling of moral wrongness; if the ensuing harm is complex and not immediately clear, as it is with say assault or murder, the process of internalization does not kick in as readily. Even in the case of a notorious fraudster such as Bernard Madoff, the instinctual feeling of culpability is not really commensurate with the true extent of the harm he inflicted upon thousands of his victims.

complicated calculations regarding degree of harm.<sup>32</sup> In this sense, the entire deontological position is arguably no more than an adaptive quality. To plunge a knife into a person's body is the same act whether it is a surgeon conducting a lifesaving operation or a murderer brutally stabbing a victim. The moral nature of an act arises wholly in relation to the consequences that flow from it—taking a life as in the case of the murderer, or saving a life as in the case of the surgeon. To reiterate: our aim is not to criminalize lying because it is inherently wrong; rather it is merely to prevent the harm that certain lies bring about in certain situations. There must be a harm produced, and this harm must be particularly grave. If there is any truly objective benchmark for criminality, it is this.

## B. THE PRESENT REGULATION OF LYING IN THE LAW

The idea of criminalizing lying in certain contexts should not appear so radical given that the law already prohibits deception in a variety of circumstances, such as in criminal law, contract law, constitutional law, and tort law. In this subpart, we will provide an overview of the extent to which the law already addresses the act of lying, so as to clarify the present scope and limitation of these legal structures.

### *1. Tort Law*

#### a. Misrepresentation

Misrepresentation is a tort and can create civil liability if it results in a pecuniary loss.<sup>33</sup> The tort of misrepresentation (also called deceit or fraud) primarily covers financial injury. A misrepresentation is a false statement of fact that the victim relies upon to her detriment.<sup>34</sup> The critical element in the tort is the intention to deceive the other party—called scienter.<sup>35</sup> The speaker must know that “the statement is false, or does not believe in its truth, or acts in reckless disregard for its truth or falsity.”<sup>36</sup> The speaker must also know that the listener is relying on the factual correctness of the statement, and this reliance must be reasonable and justified.<sup>37</sup> Should a real estate developer who owns land knowingly and falsely advertise it as valuable commercially zoned land, this would amount to a

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<sup>32</sup> See Druzin, *supra* note 30.

<sup>33</sup> See Richard A. Epstein, *Privacy, Property Rights and Misrepresentations*, 12 GA. L. REV. 455, 466–67 (1977).

<sup>34</sup> WILLIAM P. STATSKY, *ESSENTIALS OF TORTS* 291 (2000).

<sup>35</sup> *Id.* at 202.

<sup>36</sup> *Id.* at 292.

<sup>37</sup> *Id.*

misrepresentation; if a buyer should purchase the land relying upon the false statement, he may have a case against the developer for any monetary losses resulting from the purchase. Liability for this tort can be quite wide with the result that it can encompass nondisclosure of material facts by a fiduciary or a doctor or lawyer.

Many states even allow a plaintiff to sue for negligent misrepresentation for purely pecuniary harms where scienter is technically absent.<sup>38</sup> This would include situations where the speaker was simply careless as to the truth of the statement, such as not taking reasonable steps to verify the statement's accuracy. Traditionally, damages were limited to pecuniary or economic injury; however, many courts now allow recovery for damage to property and to the person, and in certain circumstances distress, disappointment, and loss of enjoyment.<sup>39</sup>

#### b. False Pretenses

Somewhat related to the tort of misrepresentation is the statutory offense of false pretenses, which concerns defrauding an individual of their property. It addresses pecuniary loss, though this financial injury may take a variety of forms. For instance, the North Carolina false pretense statute relates to the taking of "any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value . . . ."<sup>40</sup> At common law, false pretenses is defined as an intentional false representation of fact designed to cause the victim to pass title of his property.

#### c. Defamation

Lying is addressed in other forms in tort as well. Defamatory statements can incur tortious liability in the form of slander or libel. Defamation is the public issuance of a false statement about another party that results in the other party suffering some sort of harm.<sup>41</sup> A defamatory statement is one that is "calculated to injure the reputation of another, by exposing them to hatred, contempt or ridicule."<sup>42</sup> In many jurisdictions,

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<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 289.

<sup>40</sup> N.C. GEN. STAT. § 14-100(a) (2010).

<sup>41</sup> BLACK'S LAW DICTIONARY 427 (8th ed. 1999).

<sup>42</sup> *Parmiter v. Coupland*, (1840) 151 Eng. Rep. 340, 343.

defamation is a crime as well as a civil wrong.<sup>43</sup> Along with substantial fines, the criminal liability can be quite serious. For instance, under German law, defamation is a criminal offense; an offender can be sentenced to a prison term of up to five years. Greece, Kazakhstan, and China also allow for sentences of up to five years for defamation.<sup>44</sup> Under Canadian criminal law, a person who knowingly publishes false, defamatory libel is subject to a prison term of up to five years.<sup>45</sup> Under Italian criminal law, certain cases of defamation, broadcasts on television, for example, as well as libel through the press, are punishable with terms of up to six years imprisonment.<sup>46</sup> In Moldova, the penalty for defamation can be as high as seven years imprisonment.<sup>47</sup>

In many authoritarian regimes anti-defamation law is used as an instrument of political control or to silence journalistic dissent.<sup>48</sup> In Central and South American jurisdictions anti-defamatory laws, known as *descato* (disrespect) laws, are widespread. *Descato* laws specifically protect the honor of public officials.<sup>49</sup> Bolivia, Brazil, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Paraguay, Uruguay, and Venezuela all maintain such laws.<sup>50</sup> These laws do not even require that the statement is a lie. Imprisonment for defamation is commonplace across much of Asia and the

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<sup>43</sup> See ORG. FOR SEC. & CO-OPERATION IN EUROPE, LIBEL AND INSULT LAWS: A MATRIX ON WHERE WE STAND AND WHAT WE WOULD LIKE TO ACHIEVE I (2005), available at <http://www.osce.org/files/documents/1/0/41958.pdf>.

<sup>44</sup> See *id.* at 68, 84. For an examination of Chinese defamation law, see H. L. Fu & Richard Cullen, *Defamation Law in the People's Republic of China*, 11 *TRANSNAT'L L. J.* 1, 1 (1998), and *Criminal Defamation*, GLOBAL CAMPAIGN FOR FREE EXPRESSION, <http://www.article19.org///.html> (last visited May 20, 2010).

<sup>45</sup> Criminal Code, R.S.C. 2010, c. C-46, § 300. Under § 296(1) of the Canadian Criminal Code, the publishing of "blasphemous libel" is punishable by up to two years in prison. It is, however, a defense if the individual can establish that they were "expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject." *Id.* at § 296(1). New Zealand's Crimes Act 1961, § 123 also makes blasphemous libel a criminal offense punishable by up to a year imprisonment. A similar criminal provision in England and Wales was abolished in 2008, replaced by the Racial and Religious Hatred Act, 2006. See Criminal Justice and Immigration Act, 2008, c. 5, § 79 (abolishing common law offenses of blasphemy and blasphemous libel); Racial and Religious Hatred Act, 2006, c. 1, § 1.

<sup>46</sup> ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 43, at 78–79.

<sup>47</sup> *Id.* at 107.

<sup>48</sup> See, e.g., Fu & Cullen, *supra* note 44, at 1; see also GLOBAL CAMPAIGN FOR FREE EXPRESSION, *supra* note 44.

<sup>49</sup> FRANCISCO FORREST MARTIN & STEPHEN J. SCHNABLY, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS* 763 (2006).

<sup>50</sup> See GLOBAL CAMPAIGN FOR FREE EXPRESSION, *supra* note 44.

Middle East, where it is frequently used by governments for political purposes.<sup>51</sup>

In the United States, there are no federal laws criminalizing defamation; however, criminal defamation laws remain “on the books” in seventeen states and two territories.<sup>52</sup> Although they are not widely used, between 1965 and 2004, sixteen individuals were convicted under criminal defamation statutes in the United States, nine of which resulted in sentences of imprisonment.<sup>53</sup> The average jail time for these sentences was six months, approximately 173.6 days.<sup>54</sup> Other punishments included probation, community service, and fines averaging approximately \$1,700.<sup>55</sup>

In response to spurious civil defamation lawsuits filed specifically to intimidate and silence critics by inundating them with burdensome legal costs, otherwise known as SLAPP lawsuits (strategic lawsuits against public participation),<sup>56</sup> many states have enacted anti-SLAPP laws.<sup>57</sup> In many cases, “libel, slander and other suits [are] filed against people who would [otherwise] testify, protest or speak out at on certain public issues, such as zoning and land use issues.”<sup>58</sup> These suits are essentially retaliatory

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<sup>51</sup> *See id.*

<sup>52</sup> ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 43, at 171. These states are: Colorado (COLO. REV. STAT. § 18-13-105 (2010)); Florida (FLA. STAT. § 836.01-836.11 (2010)); Idaho (IDAHO CODE ANN. § 18-4801-18-4809 (2010)); Kansas (KAN. STAT. ANN. § 21-4004 (2010)); Louisiana (LA. REV. STAT. ANN. 14:47 (2010)); Michigan (MICH. COMP. LAWS § 750.370 (2010)); Minnesota (MISS. CODE ANN. § 609.765 (2010)); Montana (MONT. CODE ANN. § 13-35-234 (2010)); New Hampshire (N.H. REV. STAT. ANN. § 644:11(2010)); New Mexico (N.M. STAT. ANN. § 30-11-1 (2010)); North Carolina (N.C. GEN. STAT. § 14-47 (2010)); North Dakota (N.D. CENT. CODE § 12.1-15-01 (2010)); Oklahoma (OKLA. STAT. tit. 21 §§ 771-781 (2010)); Utah (UTAH CODE ANN. § 76-9-404 (West 2010)); Virginia (VA. CODE ANN. § 18.2-417 (2010)); Washington (WASH. REV. CODE § 9.58.010 (2010)); Wisconsin (WIS. STAT. § 942.01 (2010)), as well as the territories of Puerto Rico (P.R. LAWS ANN. tit. 33, §§ 4101–4104 (2010)), and the Virgin Islands (14-59 VI CODE ANN. § 1172 (LexisNexis 2010)).

<sup>53</sup> ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 43, at 78–79.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> For a good overview of SLAPP lawsuits, see George W. Pring & Penelope Canan, *Strategic Lawsuits against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937 (1991) (providing an overview and study of the trend); *see also* MICHAEL PILL, *STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP): SUBSTANTIVE LAW AND LITIGATION STRATEGY* (1998); GEORGE WILLIAM PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

<sup>57</sup> Nineteen states in the U.S.—California, Delaware, Florida, Georgia, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington—have enacted such laws. ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 43, at 172.

<sup>58</sup> *Id.* at 173.

lawsuits brought by private entities such as real estate developers, politicians, and opponents of civil rights and consumers' rights.

#### d. Food Disparagement Laws

In much of the United States, defamation extends even to broccoli. Under Colorado state law it is a crime to knowingly “make any materially false statement” about an agricultural product.<sup>59</sup> An additional twelve other states have instituted what is known as food disparagement laws (veggie libel laws),<sup>60</sup> which effectively make it easier for food producers to successfully sue their critics for libel.<sup>61</sup> These laws create a cause of action for food producers to “recover damages for the disparagement of any perishable product or commodity.”<sup>62</sup> The elements of the claim under agricultural disparagement statutes require the public dissemination of “false information”; however, state law varies as to whether the disseminator must be aware that the statement is false.<sup>63</sup> For instance, Alabama and Oklahoma employ a strict liability standard; the only requirement to make a statement actionable is the “dissemination to the public in any manner of false information.”<sup>64</sup> Florida, Arizona, and Georgia, however, require that this be done in a “willful or malicious”

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<sup>59</sup> COLO. REV. STAT. ANN. § 35-31-101 (2007) (“It is unlawful for any person, firm, partnership, association, or corporation or any servant, agent, employee, or officer thereof to . . . knowingly . . . make any materially false statement . . . for the purpose of in any manner restraining trade, any fruits, vegetables, grain, meats, or other articles or products ordinarily grown, raised, produced, or used in any manner or to any extent as food for human beings or for domestic animals.”).

<sup>60</sup> For a concise account of the history of the food libel laws and the corporate effort behind them, see SHELDON RAMPTON & JOHN STAUBER, *MAD COW U.S.A.* 17–24, 137–45 (1997).

<sup>61</sup> These states include: Alabama (ALA. CODE § 6-5-620 (1995)); Arizona (ARIZ. REV. STAT. ANN. § 3-113 (1995)); Florida (FLA. STAT. § 865.065 (1994)); Georgia (GA. CODE ANN. § 2-16-1 (1995)); Idaho (IDAHO CODE ANN. § 6-2001 (1995)); Louisiana (LA. REV. STAT. ANN. § 3:4501 (1995)); Mississippi (MISS. CODE ANN. § 69-1-253(a) (1995)); North Dakota (N.D. CENT. CODE § 32-44-02 (2010)); Ohio (OHIO REV. CODE ANN. § 2307.81 (2010)); Oklahoma (OKLA. STAT. tit. 2, §§ 3011-12 (2010)); South Dakota (S.D. CODIFIED LAWS § 20-10A-2 (2010)); and Texas (TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-.004 (2010)).

<sup>62</sup> This wording appears verbatim in: ALA. CODE § 6-5-620 (1994); ARIZ. REV. STAT. ANN. § 3-113 (West 1995); FLA. STAT. § 865.065 (1994); GA. CODE ANN. § 2-16-1 (1994); LA. REV. STAT. ANN. § 4501 (West 1995); MISS. CODE ANN. § 69-1-251 (1994); OHIO REV. CODE ANN. § 2307.81(A) (1996); and S.D. CODIFIED LAWS § 20-10A-2 (1995).

<sup>63</sup> See Kevin A. Isern, *When Is Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233, 239–40 (1997).

<sup>64</sup> ALA. CODE § 6-5-620(1) (1994); OKLA. STAT. § 2-3011(1) (1995).

manner.<sup>65</sup> Food disparagement laws were brought to the forefront of public awareness in the case of *Texas Beef Group v. Winfrey*, when Texas cattlemen sued television personality Oprah Winfrey for “false defamation of perishable food” and “business disparagement” over comments she and a guest made regarding beef safety in the wake of the mad cow disease scare.<sup>66</sup>

## 2. Contract Law

Lying can of course incur liability in contract law in the form of misrepresentation. As in tort, a misrepresentation is an unambiguous, false or misleading statement of fact or law that is addressed to the misled party, which induces the other party to rely upon the misrepresentation and enter into a contract.<sup>67</sup> Case law defines it as “a false statement made knowingly or without belief in its truth or recklessly careless whether it be true or false.”<sup>68</sup> Depending upon the type of misrepresentation, the injured party can rescind the contract, sue for damages, or both.<sup>69</sup> It is interesting that what characterizes misrepresentation is the intention to deceive the other party.<sup>70</sup> Mere sales talk or statements of opinion that are false are nevertheless not tantamount to misrepresentation.<sup>71</sup> The degree to which there is an intention to deceive the other party, even where the harm is identical, will determine the seriousness of the misrepresentation as evident by the distinction drawn between fraudulent, negligent, and innocent misrepresentation. In each, the distinguishing feature is the degree to which one party is intentionally lying.

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<sup>65</sup> ARIZ. REV. STAT. ANN. § 3-113(A) (West 1995); FLA. STAT. § 865.065(a) (1994); GA. CODE ANN. § 2-16-2(1) (1994).

<sup>66</sup> Winfrey exclaimed that she was “stopped cold from eating another burger.” *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 688 (5th Cir. 2000). In the two weeks after the show, beef prices fell by roughly ten percent and remained depressed for eleven months. See F. Dennis Hale, *Free Speech Rouges and Freaks: An Analysis of Amusing and Bizarre Litigants of Free Expression*, 25 COMM. & L. 55, 63 (2003).

<sup>67</sup> EWAN MCKENDRICK, *CONTRACT LAW* 217–18 (8th ed. 2009).

<sup>68</sup> *Derry v. Peek*, (1889) 14 App. Cas. 337.

<sup>69</sup> JEFFREY F. BEATTY & SUSAN S. SAMUELSON, *BUSINESS LAW AND THE LEGAL ENVIRONMENT* 318 (2006).

<sup>70</sup> For a fascinating analysis of promissory fraud, see IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* (2005).

<sup>71</sup> See *Bisset v. Wilkinson*, [1927] A.C. 177 (stating that a false statement of fact is not a misrepresentation as to fact); *Dimmock v. Hallett* (1866) 2 L.R.P.C. 21 (stating that puff is not considered to be a statement of fact).

### 3. Constitutional Law

Lying is also addressed under constitutional law. The constitutional protection granted to freedom of speech is perhaps the most robust protection of any individual right under the United States Constitution.<sup>72</sup> The First Amendment affords explicit protection to freedom of expression: “Congress shall make no law . . . abridging the freedom of speech.”<sup>73</sup> Yet even this right is subject to restrictions in certain cases where the speaker is deliberately making a false statement.<sup>74</sup> For instance, defamatory speech is not constitutionally protected. Although “under the First Amendment, there is no such thing as a false idea,”<sup>75</sup> *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* established that First Amendment protection does not extend to slanderous or libelous statements where the speaker knows the information is patently untrue.<sup>76</sup> The Supreme Court has made it clear that “the Constitution does not provide absolute protection for false factual statements that cause private injury.”<sup>77</sup> In such cases where actual malice can be proven, the speaker may be subject to charges of defamation or libel.<sup>78</sup> “Actual malice” is present where the speaker was aware that the statement was false (or acted with reckless disregard for the truth or falsity of the statement), and intends to cause harm by doing so.<sup>79</sup> False or misleading advertising is also not constitutionally protected.<sup>80</sup> The law established in the libel decisions in fact suggests that the government may take even “broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation.”<sup>81</sup>

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<sup>72</sup> See Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 379 (2006).

<sup>73</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I, § 2.

<sup>74</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, 49 n. 10 (1961).

<sup>75</sup> *Gertz*, 418 U.S. at 339.

<sup>76</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>77</sup> *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 777 (1976).

<sup>78</sup> *N.Y. Times Co.*, 376 U.S. at 282.

<sup>79</sup> *Id.* at 286–88. Under the New York Penal Code, for example, false advertising is delineated under section 190.20. N.Y. PENAL LAW § 190.20 (McKinney 2009).

<sup>80</sup> *Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781, 786 (Cal. Ct. App. 1999); see also KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 124 (2004).

<sup>81</sup> *Va. Pharmacy Bd.*, 425 U.S. at 777.

While hate speech<sup>82</sup> is constitutionally protected in the United States,<sup>83</sup> this is not true in other jurisdictions.<sup>84</sup> For instance, in many European jurisdictions, Holocaust denial is a crime.<sup>85</sup> Individuals have been prosecuted for denying the occurrence of the genocide of Jews during World War II in numerous European countries.<sup>86</sup> Laws in Austria, Belgium, Switzerland, and Germany include the trivialization of the Holocaust as a punishable offense.<sup>87</sup> No “actual” harm need result from the conduct itself as Holocaust denial is viewed as an expression of anti-Semitism and the lie alone (without proven harm) is enough to attract criminal prosecution.<sup>88</sup> It might be argued, of course, that although no immediate harm need result from the lie, Holocaust denial does tend to encourage and perpetuate anti-Semitism amongst its addressees and may induce behavior that will result in attacks on Jews.<sup>89</sup>

#### 4. Criminal Law

Of greatest relevance to this Article, however, is that in certain contexts lying is a crime. We briefly touched on criminal defamation

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<sup>82</sup> We bring up hate speech here mainly in the context of Holocaust denial. However, with many forms of hate speech, despite how reprehensible the statement, it is quite likely that the speaker actually believes what they are saying is true. In referencing Holocaust denial here, we are making the assumption that many such deniers do not actually believe in the truth of their position.

<sup>83</sup> See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2002) (looking at the effects of technology on United States constitutional protection of hate speech); Paul J. Becker et al., *The Contentious American Debate: The First Amendment and Internet-based Hate Speech*, 14 INT’L REV. L., COMPUTERS & TECH. 33 (2000) (examining constitutional protection of hate speech in relation to the internet).

<sup>84</sup> See Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305 (1998) (comparing the protection of hate speech in the United States with foreign jurisdictions); Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World*, 53 ME. L. REV. 487 (2001) (placing U.S. protection of hate speech in an international context).

<sup>85</sup> Holocaust denial is currently subject to fines or imprisonment in ten European states: Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Slovakia, and Switzerland. Christina Schori Liang, *Europe for the Europeans: The Foreign and Security Policy of the Populist Radical Right*, in EUROPE FOR THE EUROPEANS: THE FOREIGN AND SECURITY POLICY OF THE POPULIST RADICAL RIGHT 1, 24 (Christina Schori Liang ed., 2007).

<sup>86</sup> Robert A. Kahn, *Imagining Legal Fairness: A Comparative Perspective*, in NEW APPROACHES TO COMPARATIVE POLITICS: INSIGHTS FROM POLITICAL THEORY 125, 134 (Jennifer S. Holmes ed., 2003).

<sup>87</sup> See Catriona McKinnon, *Should We Tolerate Holocaust Denial?*, 13 RES PUBLICA 9, 13 (2007).

<sup>88</sup> See McKinnon, *supra* note 87.

<sup>89</sup> *Id.* at 19.

above; however, the criminalization of lies is not confined merely to defamation. Under English criminal law, deception is a crime in certain circumstances. This has not always been the case as over the years there has been a gradual progression towards the criminalization of more acts and forms of deception. Early English law was merely concerned with threats aimed at the public at large and so punished only specific categories of deception, such as forgery and the use of false weights and measures.<sup>90</sup> With the advent of the Industrial Revolution followed the broadening of fraud offenses: the offense of false pretenses (discussed above) was added to the list of deception offenses in England in 1757 under a statute which made it a crime to “knowingly or designedly” by false pretenses to obtain title to “money, goods, ware or merchandises” from another person “with the intent to cheat or defraud.”<sup>91</sup>

#### a. Perjury

But the law has continued to evolve since then and we have seen an impressive expansion of the criminal law regarding deception over the years. Under most jurisdictions, perjury and false declarations are considered to be serious offenses, carrying heavy penalties.<sup>92</sup> Under U.S. law, the federal perjury statute requires five basic elements: (1) an oath authorized by U.S. law, (2) taken before a competent tribunal, officer, or person, (3) a false statement, (4) willfully made, (5) as to facts material to the hearing.<sup>93</sup> Historically, perjury has always been considered a very serious offense: under the Code of Hammurabi, the Roman law, and the medieval law of France, the act of bearing false witness was punishable by death.<sup>94</sup> Indeed, the Hebrew bible even makes reference to perjury in the ninth commandment that exhorts, “Thou shalt not bear false witness against

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<sup>90</sup> See Alexander & Sherwin, *supra* note 10, at 405.

<sup>91</sup> Stuart P. Green, *Lying, Misleading and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 185 (2001). Although the scope of this crime was considerably broader than the common law crimes of cheat and forgery, false pretenses remained limited in that it required a false representation of an existing fact, rather than merely a false promise, opinion or prediction. So for example, to falsely state that a piece of jewelry has been appraised at a stated price constitutes a false representation constituting liability for false pretenses but falsely declaring that the jewelry will appreciate in value over the next year does not incur liability.

<sup>92</sup> WORLD OF CRIMINAL JUSTICE 562 (Shirelle Phelps ed., 2002).

<sup>93</sup> See 18 U.S.C. § 1621 (2006); 18 U.S.C. § 1623 (2006). False declarations is a crime closely related to perjury; it requires that a “false material declaration” be made knowingly under oath in a proceeding “before or ancillary to any court or grand jury.” Green, *supra* note 91, at 174.

<sup>94</sup> *Id.*

thy neighbor.”<sup>95</sup> Modern day attitudes have not altered: recent studies of attitudes toward crime show that perjury is still considered a particularly egregious offense.<sup>96</sup> The seriousness of the offense stems from the fact that it is an offense against the state, which can usurp the power of the courts, resulting in miscarriages of justice. Under United States law, perjury is a felony and provides for a prison sentence of up to five years.<sup>97</sup> In the U.K., under the Perjury Act 1911, a potential penalty for perjury entails an even lengthier prison sentence of up to seven years.<sup>98</sup>

#### b. False Statements

It is also a crime to make false statements to a federal official.<sup>99</sup> For the statement to be considered material the statement merely needs to possess the “natural tendency to influence or [be] capable of influencing, the decision of the decision making body to which it is addressed.”<sup>100</sup> It does not matter if the official is or is not actually misled by the statement—the act alone is enough to incur criminal liability. Those found guilty of making “any materially false, fictitious, or fraudulent statement or representation” are subject to a prison sentence of up to five or eight years under federal law (depending on its nature).<sup>101</sup> This provision captures false written statements as well.<sup>102</sup>

#### c. False Impersonation

False impersonation is also a crime. For example, under New York penal law, a person is guilty of this offense if one “knowingly misrepresents his or her actual name, date of birth or address to a police officer or peace officer with intent to prevent such police officer or peace officer from ascertaining such information.”<sup>103</sup> New York penal law also contains the crimes of criminal impersonation in the first degree (impersonating a police

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<sup>95</sup> *Exodus* 20:16 (King James). The bible also makes similar references to the making of false statements elsewhere: “Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness,” *Exodus* 23:1 (King James); “You shall not bear false witness against your neighbour,” *Deuteronomy* 5:20 (King James). Other similar references include: *Exodus* 23:6, 7 *Leviticus* 19:11, 16; *Deuteronomy* 19:15–21; 1 *Samuel* 22:8–19; 1 *Kings* 21:10–13; *Psalms* 15:3, 101:5–7; *Proverbs* 10:18, 11:13; *Matthew* 26:59, 60; *Acts* 6:13; *Ephesians* 4:31; 1 *Timothy* 1:10; 2 *Timothy* 3:3; *James* 4:11.

<sup>96</sup> Green, *supra* note 91, at 175.

<sup>97</sup> 18 U.S.C. § 1621 (2006); 28 U.S.C. § 1746 (2006).

<sup>98</sup> Perjury Act, 1911, 1 & 2 Geo. 5, c. 6, § 1 (Eng.).

<sup>99</sup> 18 U.S.C. § 1001 (2006).

<sup>100</sup> *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

<sup>101</sup> 18 U.S.C. § 1001(a)(2) (2006).

<sup>102</sup> *Id.* at § 1001(a)(3).

<sup>103</sup> N.Y. PENAL LAW § 190.23 (McKinney 2009).

officer),<sup>104</sup> and criminal impersonation in the second degree (impersonation with the “intent to obtain a benefit or to injure or defraud another”).<sup>105</sup> Other offenses involving the making of a false statement under the New York penal code include false advertising,<sup>106</sup> and making a false statement of credit terms<sup>107</sup>.

#### d. Fraud

Finally, we look at lying in the form of criminal fraud. In addition to being an action in tort, fraud is increasingly the subject of criminal action at both the state and federal levels.<sup>108</sup> Early in the common law, fraud was subject to criminal prosecution only in cases that involved the defrauding of the public; acts of fraud between private parties was left entirely to civil proceedings.<sup>109</sup> But as with other acts of deception, the law has increasingly sought to criminalize such behavior.

Fraud is in fact difficult to define as it comes in many flavors; however, the basic definition is: “[a]ll multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning or dissembling (disguising, concealing), and any unfair way which another is cheated.”<sup>110</sup> While fraudulent conduct may be quite sophisticated, its core component involves simply the deception of a party so as to defraud them of money, goods, or services.<sup>111</sup>

To be exact, fraud itself is not a defined crime with prescribed elements;<sup>112</sup> rather, “fraud is a concept at the core of a variety of criminal

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<sup>104</sup> *Id.* at § 190.26.

<sup>105</sup> *Id.* at § 190.25.

<sup>106</sup> *Id.* at § 190.20.

<sup>107</sup> *Id.* at § 190.55.

<sup>108</sup> DAVID BRODY & JAMES R. ACKER, *CRIMINAL LAW* 342 (2007).

<sup>109</sup> Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 736 (1999); *see also* J.W. CECIL TURNER, *KENNY’S OUTLINES OF CRIMINAL LAW* 275 (1952) (describing fraud targeting the public); WILLIAM LAWRENCE CLARK & WILLIAM LAWRENCE MARSHALL, *A TREATISE ON THE LAW OF CRIMES* § 12.30 (Marian Quinn Barnes ed., 7th ed. 1967) (distinguishing between public and private frauds); LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 451–54 (5th ed. 1993) (discussing the historical distinction between public and private frauds).

<sup>110</sup> BLACK’S LAW DICTIONARY 468 (5th ed. 1979).

<sup>111</sup> *See* THOMAS J. GARDNER & TERRY M. ANDERSON, *CRIMINAL LAW* 379 (2008).

<sup>112</sup> This is true under federal law where one cannot actually be convicted for the crime of “fraud” per se. However, in some states there are statutes specifically labeled “fraud.” *See, e.g.*, N.M. STAT. ANN. § 30-16-6 (Michie 1978).

statutes.”<sup>113</sup> Because behavior that constitutes fraud can take a variety of forms, the definition of fraud may vary depending upon the nature of the statute that is addressing it.<sup>114</sup> Both the federal and state governments have a variety of fraud statutes at their disposal to prosecute such conduct. The fraud-related laws range from generic fraud statutes, such as conspiracy to defraud and wire fraud, which encompass a broad spectrum of fraudulent conduct, to statutes that “specifically limit the object of the offense to a narrow range of fraudulent conduct.”<sup>115</sup>

U.S. law regarding criminal fraud largely mirrors English fraud law known generically as deception offenses as defined under the Theft Acts.<sup>116</sup> The Fraud Act 2006 effectively replaced the 1968 and 1978 Theft Acts.<sup>117</sup> For present purposes, the most pertinent section of the Act is § 2(1), which provides that an individual commits the offense where he dishonestly makes a false representation and by the making of the representation, intends to make a gain for himself or another, or to cause loss to another, or expose another to a risk of loss.<sup>118</sup> This Article would not profit from a detailed explanation of the various elements of this crime, but suffice to say that the Fraud Act in British law, as with U.S. fraud law, is primarily concerned with gain or loss in the pecuniary and proprietary sense and could not logically support an extension to any other type of damage or loss.<sup>119</sup> In the English common law, the crime of conspiracy to defraud is likewise concerned entirely with injury of an economic nature.<sup>120</sup> To meet the criteria for the offense, it is necessary to prove that “the conspirators have dishonestly agreed to bring about a state of affairs which they realize will or may deceive the victim into so acting, or failing to act, that he will

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<sup>113</sup> See Podgor, *supra* note 109, at 730.

<sup>114</sup> *Id.* at 740.

<sup>115</sup> *Id.* at 734.

<sup>116</sup> *Id.* at 737; see also EMLIN MCCLAIN, 1 TREATISE ON THE CRIMINAL LAW 669–70 (1897) (comparing statutes addressing fraud in the United States with those of England); ANTHONY ARLIDGE ET AL., ARLIDGE & PARRY ON FRAUD 33 (2d ed. 1996) (explaining the definition of fraud under English law).

<sup>117</sup> Section 1(1) of the Act states that a person is guilty of fraud if he is in breach of any of § 2 (fraud by false representation), § 3 (fraud by failing to disclose information), or § 4 (fraud by abuse of position). See Fraud Act, 2006, c. 35, § 1.

<sup>118</sup> See Carol Withey, *The Fraud Act 2006—Some Early Observations and Comparisons with the Former Law*, 71 J. CRIM. L. 220, 221 (2007).

<sup>119</sup> The definition of “gain and loss” is found in § 5 of the Fraud Act 2006. “Gain” extends only to gain or loss in money or other property (including real and personal property) and includes gain or loss of a temporary or permanent nature. See *id.* at 226.

<sup>120</sup> The leading English authority for the offense is *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819. For an overview of the crime of conspiracy to defraud, see DUNCAN BLOY ET AL., PRINCIPLES OF CRIMINAL LAW 165–68 (2000).

suffer economic loss or his economic interests will be put at risk . . . .”<sup>121</sup> The understanding of the term defraud here is entirely financial.<sup>122</sup> While these fraud-related offenses successfully capture situations where the deception is financial in nature, other forms of injury are left largely unaddressed. For instance, the charge of fraud would not apply to the scenarios set out in the introduction to this Article.

Overall, there has been a progressive expansion of the criminal law to conduct that involves deception. This is evident in many of the crimes discussed in this section. The above body of regulation rests upon the notion of serious resulting harm, be it pecuniary, administrative, or an assault on an individual’s reputation. The crime this Article proposes is also predicated upon the seriousness of harm produced by a lie. It is not an exercise in moral censure, or a self-righteous incursion into the sphere of private morality. The crime is not comparable to so-called victimless crimes,<sup>123</sup> such as prostitution, gambling, loitering, public drunkenness, drug use, speeding, or public nudity, where there is no requirement of harm (in the sense of harm to another unconsenting person)—the purpose of these laws is essentially to prohibit conduct that is deemed intrinsically immoral.<sup>124</sup> As already stated, though a case could be made for it, we are not concerned here with the moral blameworthiness of lying; rather we are concerned with its consequences—the harm it creates. Indeed, as two scholars eloquently put it, “man has an inalienable right to go to hell in his own fashion, provided he does not directly injure the person or property of another on the way.”<sup>125</sup>

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<sup>121</sup> Lord Goff in *R v. Wai Yu-tsang*, (1992) 1 A.C. 269.

<sup>122</sup> The one exception to this is where the intended victim is a public servant and the intention is to fraudulently interfere with the performance of a public duty. PETER GILLIES, *THE LAW OF CRIMINAL CONSPIRACY* 109 (1990). In *Scott v. Metropolitan Police Commissioner*, the English House of Lords made it clear that “a conspiracy to defraud designed to prejudice a private person in a way not affecting his financial interest, is not necessarily a criminal conspiracy. In both of the opinions appearing in this decision, specific reference is made to the need for economic prejudice.” *Id.* at 113.

<sup>123</sup> For an in-depth exposition on the idea of victimless crimes, see E.M. SCHUR & H.A. BEDAU, *VICTIMLESS CRIMES—TWO SIDES OF A CONTROVERSY* (1974); see also Alan Wertheimer, *Victimless Crimes*, 87 *ETHICS* 302 (1977) (arguing that the argument for the decriminalization of victimless crimes is flawed).

<sup>124</sup> Indeed, such laws are at odds with Mill’s harm principle. See MILL, *supra* note 25 (“His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right . . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others.”).

<sup>125</sup> NORVAL MORRIS & GORDON J. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* 2 (1972).

### C. RELUCTANCE OF THE LAW TO REGULATE LYING

It is evident that over the years, both the civil and criminal law systems have become progressively less tolerant of deceitful conduct. However, while the criminal law punishes both lying in the public sphere as against the government and fraud that leads to pecuniary loss, there are very real limits to the criminal law's willingness to encroach upon private interactions between individuals. And indeed there are good reasons why the criminal law's regulation of deception is at odds with society's moral positions on the same topic. Before advancing our argument, these objections should be considered.

#### *1. High Costs of Regulation*

One of the most cogent explanations for the criminal law's inability or lack of desire to regulate lying is that costs associated with regulating deception are simply too high. While it may be desirable to eradicate all forms of deceptive speech and behavior, given scarce resources, more practical considerations must give way as other priorities take center stage. The administrative costs involved in fact-finding and dispute resolution fees that would be imposed on both the private parties involved and the legal institutions charged with adjudication are difficult to justify given the already stretched budgets of most criminal law systems.

#### *2. Superiority of Informal Enforcement*

Another possible explanation for the incompleteness of legal regulation of lying is that the legal system prefers to defer the responsibility to more informal social processes—a more spontaneous private ordering that utilizes the mechanisms of disapproval and reputation to sanction liars.<sup>126</sup> Informal enforcement of norms on deception has several

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<sup>126</sup> The literature on spontaneous ordering and norm enforcement is quite fascinating. Although by no means a complete list, for a good snapshot of the literature, see e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 139 (1991); 1 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973); JOHN MAYNARD SMITH, *EVOLUTION AND THE THEORY OF GAMES* (1982); MATT RIDLEY, *THE ORIGINS OF VIRTUE* 53 (1997); MICHAEL TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* 28 (1982); Robert Axelrod and William D. Hamilton, *The Evolution of Cooperation*, 211 *SCI.* 1390 (1981); Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 *AM. POL. SCI. REV.* 306 (1981); B.L. Benson, *Economic Freedom and the Evolution of Law*, 18 *CATO J.* 209 (1998); R.C. Ellickson, *The Aim of Order Without Law*, 150 *J. INSTITUTIONAL & THEORETICAL ECON.* 97 (1994). For a good overview of the concept, see Barry Norman, *The Tradition of Spontaneous Order*, 5 *LITERATURE OF LIBERTY* 6 (1982). For spontaneous norm emergence in a commercial context, see Bryan Druzin, *Law Without The State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order Within Commercial Systems*, 41 *GEO. J. INT'L L.* 559 (2010) (arguing that the engaged nature of commerce generates legal norms).

advantages over formal legal enforcement: it sidesteps the institutional and administrative costs of legal enforcement by the police and the courts by relying on naturally occurring social phenomena such as gossip, ostracism, and character signaling.<sup>127</sup> Additionally, when the consequences of deception do not involve pecuniary loss, social sanctions enforced by other people against the liar may be more effective in the long run and more satisfactory to victims. Victims may choose to resort to legal remedies when tangible harm is involved but peer groups may in fact be better at evaluating the intangible harms of deception and rein in the deceiver by expressing their disapproval.<sup>128</sup> Although informal enforcement requires community oversight of deceptive behavior, such oversight comes naturally as violators of behavioral norms will be discovered and punished accordingly. Thus the heavy hand of the state need not intrude on a self-correcting social process.

### *3. Disinclination to Intrude in Private Matters*

Many oppose the idea that the criminal law should govern the conversations and social interactions that occur between private individuals. The state is generally reluctant to intrude on private matters and preside over words and information exchanged between citizens in coffee shops and private homes. Such encroachment would represent a massive state intrusion into the private sphere. If the criminal law makes it its duty to enforce right speech everywhere, no matter how small the lie and regardless of its context or the level of harm caused, the consequences would be frightening. First Amendment issues of freedom of expression would arise, bringing in its wake serious constitutional concerns. State intervention of this magnitude would begin to look like a police state as the state's tentacles delve into the minutia of human relations. This would seem contrary to the constitutional ideals of privacy and personal liberty.

### *4. Slippery Slope*

Directly related to the above is the concern about a decidedly “slippery slope”—untold danger in allowing the criminal law to sanction lies told between private parties in living rooms where even the smallest and most innocuous of white lies give rise to criminal liability. This gives pause in that once begun, this might initiate a sort of regulatory stampede towards the most intimate aspects of individual life. Such government overreach is an unsettling prospect. Indeed, limits upon the expansion of the criminal law are, in a sense, a bulwark against state encroachment upon individual

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<sup>127</sup> See Alexander & Sherwin, *supra* note 10, at 436.

<sup>128</sup> See *id.*

freedom. The law is overcriminalized as it is, the argument would run, and there is little use in further expanding the criminal law by criminalizing yet another form of conduct.

There is a growing body of scholarship on overcriminalization.<sup>129</sup> There is broad agreement in the legal community that the justice system is already severely overcriminalized.<sup>130</sup> Some might object to the idea of criminalizing lying as exasperating this problem. There are many laws of dubious purpose still on the books that epitomize this phenomenon. For instance, depending on the state, it is a punishable offense to: sell perfume or lotion as a beverage;<sup>131</sup> color birds and rabbits;<sup>132</sup> frighten pigeons from their nests;<sup>133</sup> or disturb a congregation at worship by “engaging in any boisterous or noisy amusement.”<sup>134</sup> Under federal law, it is even a crime to place an advertisement on the U.S. flag within the District of Columbia.<sup>135</sup> To be sure, the past several years have witnessed an “explosive growth in the size and scope of the criminal law” in the United States at both the federal and state level, together with a discernable rise in the use of punishment.<sup>136</sup> Some scholars like Ken Mann have made it their professed goal to “shrink” the criminal law. These scholars advocate a more punitive civil law system that would largely mirror the criminal law, thereby reducing the need to use criminal sanctions towards punitive purposes.<sup>137</sup> Many, like Mann, believe that the gradual expansion of the criminal law is not a phenomenon to be applauded, as state encroachment on the daily

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<sup>129</sup> For a good introduction to this literature, see GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2004); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); SANFORD H. KADISH, *The Crisis of Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 21, 21–61 (1987); SANFORD H. KADISH, *More on Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 36 (1987); SANFORD H. KADISH, *The Use of Criminal Sanctions in Enforcing Economic Regulations*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 40 (1987); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 *PENN. ST. L. REV.* 1155 (2005); Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533 (1997); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 *AM. U. L. REV.* 541 (2005).

<sup>130</sup> See Darryl K. Brown, *Rethinking Overcriminalization* 2 (Bepress Legal Series, Working Paper No. 995, 2006).

<sup>131</sup> DEL. CODE ANN. tit. 4, § 901(6) (2001).

<sup>132</sup> IND. CODE § 15-17-18-11(b) (1998).

<sup>133</sup> MASS. GEN. LAWS ANN. ch. 266, § 132 (2002).

<sup>134</sup> NEV. REV. STAT. § 201.270(2) (2003).

<sup>135</sup> 4 U.S.C. § 3 (2000).

<sup>136</sup> HUSAK, *supra* note 129, at 3.

<sup>137</sup> See John C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Models and What Can Be Done About It*, 101 *YALE L.J.* 1875 (1992).

activities of ordinary citizens can be stifling. While the outlawing of all lies might fulfill a moral imperative, in reality, it would wreak havoc on society. According to this view then, lying is not a wrong that warrants monitoring and punishment; certain limitations to the reach of the criminal law should be forcefully erected before the state begins to justify its intercession in such an intimate facet of private life.

*5. Benefits of Deception and Lack of Desire to Regulate Because  
Lying is Useful*

Another convincing explanation as to why the law tolerates deception posits that because deception can in fact be extraordinarily beneficial, the law lacks the desire to regulate lying. Authors such as Diderot, Hegel, and Nietzsche all revolted against Kant's categorical and quasi-categorical moralism, as they applauded those who wished to have some transformative influence on the world.<sup>138</sup> Nietzsche once said that the ideal activist is one who "lies rather than tells the truth . . . because it requires more spirit and will."<sup>139</sup> While the truth is often the safe and conventional response, it is the liar who dares to break convention and who, from this perspective, exudes genius and morality.<sup>140</sup> Moral philosopher David Nyberg characterizes truth-telling as "morally overrated" and emphatically highlights the positive contributions that lies and other forms of deception can bring to civil society in terms of the protection of privacy and the preservation of emotional comfort.<sup>141</sup> From his standpoint, because dishonesty features so largely in our interactions with one another, it is a basic adaptive skill and can serve as means to good ends.<sup>142</sup>

While we may abhor lying and those who tell lies, we also accept that deception is a fundamental part of our culture and a legitimate and necessary means of communication. Consider the conduct of a candidate for a job interview who from the very instant he puts on his most dashing suit to his bright smile and handshake as he makes contact with his prospective employer to his mannerisms and posture throughout the interview and perhaps even the exaggerations and lies about his experience and educational background—all of this is meticulously crafted to mislead and project a confidence and competence that the job seeker does not necessarily possess. For some professionals, lying is a fundamental part of

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<sup>138</sup> See William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 450 (1999).

<sup>139</sup> *Id.* at 450.

<sup>140</sup> *Id.*

<sup>141</sup> Alexander & Sherwin, *supra* note 10, at 399.

<sup>142</sup> *Id.*

their job: in order to collect evidence and elicit cooperation, law enforcement officials often lie to criminal suspects; physicians and nurses lie to patients to alleviate distress; researchers lie to study subjects in order to manipulate responses and behavior; politicians and diplomats lie to seize an advantage in foreign policy negotiations; and as a duty to their clients, lawyers lawfully conceal information that would otherwise disadvantage their clients' case.<sup>143</sup> Indeed, it might be argued that in the adversary system, "the very institutional framework of a legal system may be used to hide the truth . . . ."<sup>144</sup> Lying is frequent and truly ubiquitous.<sup>145</sup> Studies conducted in the U.S. show that the average person tells a couple of significant lies a day, and many tell even more.<sup>146</sup> In fact, it is suggested that those who lie either too much or too little strike us as unkind; the perfectly socialized person is one who navigates seamlessly between these two extremes.<sup>147</sup> The ubiquity of lying suggests that it works and that it forms a fundamental part of our social existence. Viewed from this perspective, lying is an ordinary event that does not deserve nor necessitate the sanction of the criminal law.

The crime of egregious lying causing serious harm would have to take into account these objections, and be crafted so as to avoid the reach of all of these issues. The ambit of the law would have to be confined to exceptionally egregious cases—the severe social harm produced by lies properly balanced against the potential hazards in criminalizing lying. While one could almost certainly make the case that most lying is immoral, clearly not all lies should be made criminal.

#### D. THE CASE FOR TARGETING LIES SPECIFICALLY

Indeed, much that is wrong is not criminal, and much that is criminal is not morally wrong. There may be practical consequences involved in

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<sup>143</sup> See JAMES H. KORN, *ILLUSIONS OF REALITY: A HISTORY OF DECEPTION IN SOCIAL PSYCHOLOGY* (1997) (reflecting on the many ways that social scientists deceived their test subjects); Anita L. Allen, *Lying to Protect Privacy*, 44 *VILL. L. REV.* 161, 166 (1999); see also Jennifer Jackson, *Telling the Truth*, 17 *J. MED. ETHICS* 5 (1991) (examining how medical professionals lie); Alan Ryan, *Professional Liars*, 63 *SOC. RES.* 620, 625–41 (1996) (showing that politicians, lawyers, and physicians alike all lie in a professional context).

<sup>144</sup> W. Peter Robinson, *Lying in the Public Domain*, 36 *AM. BEHAV. SCIENTIST* 359, 366 (1993).

<sup>145</sup> See F. G. BILEY, *THE PREVALENCE OF DECEIT* 27 (1991); DAVID NYBERG, *THE VANISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE* 11 (1993); Bella M. Depaulo et. al., *Lying in Everyday Life*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 979, 993 (1996); see also CHARLES V. FORD, *LIES! LIES!! LIES!!! THE PSYCHOLOGY OF DECEIT* (1996) (examining the psychological function of lies).

<sup>146</sup> Allen, *supra* note 143, at 167.

<sup>147</sup> *Id.*

conflating these two realms. As we have already stated, the crime conceived of in this Article is not formulated from a deontological basis that condemns lying per se, rather its focus is upon the harm that such lying produces. While this distinction clarifies the theoretical underpinning to our proposed crime, it brings up a key question: if our intent is to mitigate the harm created by lies rather than the lie itself, why then single out the act of lying rather than then merely the resulting harm? That is, why craft the offense in terms of lying per se, rather than prohibiting any conduct designed to cause the targeted harm?

There is some merit to this objection. Indeed, we can see the conceptual importance placed upon the idea of harm in terms of the classification of specific offenses according to the nature and degree of their harmfulness.<sup>148</sup> As one scholar has noted, “across time and legal cultures, the primary concept around which crimes have been classified has been harmfulness.”<sup>149</sup> The relevant question becomes “who, or what interest, is harmed or sought to be protected.”<sup>150</sup> Categories are therefore typically framed in terms of “the particular type of social harm involved, such as (1) offenses against the person, (2) offenses against property, (3) offenses against habitation and occupancy, and so forth.”<sup>151</sup> And this extends to the drafting of particular offenses. Offenses often lay out a specific “consequence” to be caused by the action. To be sure, harm is “viewed as the ‘linchpin’ of the criminal law, the moral element that justifies punishment and . . . defines criminality.”<sup>152</sup> The overarching orientation of our laws is directed towards the harm that is caused by the conduct.<sup>153</sup> Yet an express form of conduct *is* identified. This serves an obvious function: it is vital to break “conduct” down into specific acts so as to educate people on just which type of behavior is prohibited.

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<sup>148</sup> See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1087 (1973).

<sup>149</sup> *Id.* at 1123.

<sup>150</sup> *Id.* at 1087.

<sup>151</sup> RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE 10 (7th ed. 1989).

<sup>152</sup> Green, *supra* note 148, at 1089; see also Albin Eser, *The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1966) (analyzing the importance of the harm principle in different criminal law systems); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (contesting the significance placed upon the harm principle). See generally WILLIAM WILSON, CRIMINAL LAW: DOCTRINE AND THEORY (2d ed. 2003) (providing a good overview of criminal law theory).

<sup>153</sup> So-called victimless crimes being notable exceptions.

Carrying the above objection to its logical absurdity, it is in theory possible to jettison the whole of the criminal law and replace it with a single provision prohibiting any “conduct causing unjustified harm upon another individual or individuals,” the sentencing for which is commensurate with the seriousness of the harm produced (this could be expanded to include attempts and negligence). But it requires no more than a moment’s consideration to see the dangers implicit in instituting such a stunningly broad, catchall offense, and the nightmarish scenarios in terms of state overreach that would surely ensue. The scope of our laws must be fenced in and kept within justifiable limits that are explicitly unambiguous. The Supreme Court has made it clear that “the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”<sup>154</sup> Acts that are made criminal “must be defined with appropriate definiteness.”<sup>155</sup> Thus, offenses should be tethered to specific acts so as to pinpoint exactly which conduct is acceptable and which is not. This is particularly true when dealing with harms of a patently amorphous and indistinct nature, such as in the case of Bartley’s lie. If we are to step so intrusively into the sphere of private activity, we must do so with extreme caution, constraining the reach of criminal regulation to a very narrow and well-targeted form of conduct. Criminalizing forms of lying allows for the effective and positive expansion of the criminal law in a restrained manner.

In certain cases, the harm is great enough to warrant criminal sanctions; however, the nature of this harm may be difficult to define precisely as it may take a variety of forms. For instance, under New York law, Bartley’s lie would not fit into any defined crime; were it a course of conduct, Bartley could only be charged with the minor, non-criminal offense of second-degree harassment under § 240.26 of the New York Penal Law. The act of lying is instrumental in causing these harms. Zeroing in on the act of lying is thus a reasonable and sensible way to regulate a serious harm that would otherwise be difficult to target without incurring the danger of legislative overbreadth. Therefore, here, the targeted harm is fixed to a very narrowly defined action—lying.

The act and the resultant harm can in a sense compensate one another so as to avoid legislative ambiguity. If, for instance, the targeted harm is particularly abstract, greater precision can be achieved by enumerating a specific conduct. Such is the case with the crime conceived of in this Article; the harm may be quite varied and difficult to pinpoint. However, we tether this harm to a precise act, that of lying. There is of course an

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<sup>154</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925).

<sup>155</sup> *Pierce v. United States*, 314 U.S. 306, 311 (1941).

unavoidable inherent indeterminacy in every law; this, however, must be minimized to the greatest extent that is practically feasible.

Precisely because of the looming danger of legal overreach and overcriminalization, where it may be socially advantageous to expand the law, legislators must go to great lengths to ensure that the scope of the law is defined as narrowly as possible. Even where such vagueness does not reach the level of the void for vagueness doctrine<sup>156</sup> and constitute an infringement on due process, generality in the law should be avoided, particularly when dealing with harm of a somewhat imprecise nature. While the harm that results from murder is obvious (death occurs) and the harm of theft is unambiguous (property is unlawfully taken), the harm that may flow from certain malicious forms of lies is not as clear-cut. For this reason the conduct should be that much clearer. The cost of generality in the law is the high price of legal overreach and the danger of selective enforcement. Indeed, this is expressed well by the Latin maxim, *misera est servitus ubi jus est aut incognitum aut vagum* (“miserable is that state of slavery in which the law is unknown or uncertain”).<sup>157</sup>

There is also the issue of deterrence. For instance, it is socially advantageous to criminalize driving while intoxicated because of the harm that it can cause. A drunk driver, however, could just as easily be charged with conduct causing (or potentially causing) serious injury or death to a person or damage to property. However, in order to delineate precisely which behavior is criminal (and thus hopefully deter this kind of behavior),

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<sup>156</sup> This doctrine, derived from the Fifth and Fourteenth Amendments’ Due Process Clauses, requires that all criminal laws must be drafted in language that is clear enough for the average person to comprehend. See *Jordan v. De George*, 341 U.S. 223, 230 (1950) (“[C]riminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law.”). For Supreme Court decisions, see *City of Chicago v. Morales*, 527 U.S. 41 (1998) (striking down a loitering ordinance as unconstitutionally vague); *Bd. of Airport Comm’r of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1986) (finding void a law banning any person from engaging in First Amendment activities in the Los Angeles International Airport); *Smith v. Goguen*, 415 U.S. 566 (1973) (finding void a law making it a crime to publicly mutilate, trample upon, deface, or treat contemptuously the flag of the United States); *Gooding v. Wilson*, 405 U.S. 518 (1971) (finding a breach of peace law overbroad); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971) (finding a vagrancy ordinance void); *Palmer v. City of Euclid*, 402 U.S. 544 (1970) (finding a loitering ordinance as unconstitutionally vague); *Baggett v. Bullitt*, 377 U.S. 360 (1963) (finding an oath that required teachers to promote respect for the flag and the institutions of the United States invalid as this could extend to criticism of government); *Thornhill v. Ala.*, 310 U.S. 88 (1939) (finding a law that completely prohibited picketing as void); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1926) (striking down an antitrust statute that failed to provide an ascertainable standard of guilt); *Connally*, 269 U.S. at 385 (finding a wage law vague).

<sup>157</sup> JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, LL.D. 352 (Wordsworth Editions Limited 1999) (1820).

the law stipulates a specific act that is closely identified with causing the harm. This is the case here; certain forms of lying can cause serious harm, thus we seek to make this behavior criminal so as to deter individuals from engaging in such conduct. Consider fraud crimes in the U.S. Code. Federal law relating to fraud crimes and false statements identifies a slew of separate acts for which an individual may be charged with fraud,<sup>158</sup> ranging from the certification of checks,<sup>159</sup> farm loan bonds and credit bank debentures,<sup>160</sup> to fraud and related activity in connection with obtaining confidential phone records information of a covered entity,<sup>161</sup> and even false pretenses on high seas and other waters.<sup>162</sup> Theoretically, this extensive list could be replaced with a single offense of fraud broadly defined. In fact, fraud itself could be categorized even more broadly as theft, and so on and so forth, on up the scale of generality until the entire U.S. Code is merely a single offense: “inflicting unjustified harm upon another.”

Consider the mail fraud statute: the inclusion of the mail (or interstate carrier) aspect provides no appreciably meaningful aspect to the offense other than specifying a precise act in which federal law may apply.<sup>163</sup> One can find even greater specificity in the statutes. For example, the range of conduct that is subject to prosecution under federal bankruptcy fraud is constrained considerably by the precise conduct delineated by the statute.<sup>164</sup> Another example is the computer fraud statute. Very specific acts such as browsing in government computers and trafficking of passwords are outlined in the statute.<sup>165</sup> By setting out specific conduct, “prosecutors are prevented from broadening the scope of the statute to encompass any type of fraudulent conduct that merely happens to involve the use of a computer.”<sup>166</sup> The Model Penal Code likewise details a variety of specific criminal offenses for fraud, including “committing fraud in the course of

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<sup>158</sup> See 18 U.S.C. § 1001–1040 (2006).

<sup>159</sup> *Id.* at § 1004.

<sup>160</sup> *Id.* at § 1013.

<sup>161</sup> *Id.* at § 1039.

<sup>162</sup> *Id.* at § 1025.

<sup>163</sup> See Podgor, *supra* note 109, at 748.

<sup>164</sup> The statute relates specifically to (1) filing a bankruptcy petition; (2) filing a document in a bankruptcy proceeding; or (3) making a false statement, claim, or promise (a) in relationship to a bankruptcy proceeding either before or after the filing of the petition; or (b) in relation to a proceeding falsely asserted to be pending under the Bankruptcy Code. 18 U.S.C. § 157 (2006).

<sup>165</sup> See 18 U.S.C. § 1030(a)(3) (2006); 18 U.S.C. § 1030(a)(5)(b) (2006); ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 237–40 (2d ed. 1997) (discussing the computer activities prohibited by 18 U.S.C. § 1030(a)).

<sup>166</sup> Podgor, *supra* note 109, at 764.

running a business, using the credit card of another, and committing forgery.”<sup>167</sup> The manner in which fraud crimes are segregated into an array of offenses that detail very specific conduct speaks to the importance of specificity.

Ideally, both the harm and conduct components of a crime should be defined as narrowly as possible. If, out of necessity, one side of this equation is vague, the remaining component should be that much more precise to minimize any ambiguity. Conduct and harm represent the two wings of legislative precision; if one is weak the other must be stronger so as to compensate. Criminalizing certain forms of lying is a way to pinpoint and deter a particularly harmful form of conduct that slips through our present net of laws.

### III. TOWARDS THE CRIMINALIZATION OF LYING: CONSTRUCTING THE CRIME OF EGREGIOUS LYING CAUSING SERIOUS HARM

This Article is not proposing that all lies should be made criminal. In certain circumstances, the harm produced by a lie may be so great as to warrant criminal sanction, but this will not always be the case. The crime we are proposing is not one that stands on conduct alone, and does not derive from deontological ethics.<sup>168</sup> Degree of harm is the sole litmus test for criminal conduct. We must therefore look to the consequences of the act; in some situations, certain forms of deception are so patently egregious that they cry out to be criminalized. Having spent the first half of this Article making the case for criminalizing certain lies, the remaining half of this discussion will now deal with how such a crime may be constructed. Feinberg’s work on the harm principle is instrumental in helping us do this.

#### A. PROPOSED CIRCUMSTANCES WHERE LIES SHOULD BE MADE CRIMINAL

Among legal scholars tackling the issue of lies and the law, Sissela Bok wrote the seminal text.<sup>169</sup> She notes that lying is a particularly difficult subject to grapple with as it embodies moral ambiguities that are not easy to resolve.<sup>170</sup> Since lying pervades every aspect of our lives, it has become ethically acceptable in some circumstances but still reproached in others.

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<sup>167</sup> *Id.* at 747. *See, e.g.*, MODEL PENAL CODE § 224.2 (1962) (Simulating Objects of Antiquity, Rarity, Etc.); MODEL PENAL CODE § 224.6 (1962) (Credit Cards); MODEL PENAL CODE § 224.7 (1962) (Deceptive Business Practices).

<sup>168</sup> It is important to emphasize again that it is not the lie/act itself which is being prosecuted but rather the act in combination with the intent to cause egregious harm where harm results.

<sup>169</sup> SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

<sup>170</sup> *Id.* at 28, 30, 33, 45, 119.

Bok observes that there are multiple reasons why people lie—we may do so in order to gain power, get out of trouble, save face, or avoid hurting another.<sup>171</sup> As a general starting point, people should avoid telling lies; they are to be given an initial negative weight and when presented with a choice, one should always seek the truthful alternative.<sup>172</sup> This assumption is based upon the harm that lying produces. Lying has the two-pronged effect of harming the victim of the lie immediately and harming society in the long term through the erosion of trust and cooperation.<sup>173</sup> It would appear that lying and related forms of deception are normal rather than abnormal behaviors—lying is a commonplace feature of our society. The difficult task, therefore, is demarcating the fine line between lies that are acceptable and those that are (clearly) not.

It has already been submitted that it would be administratively and legally impossible to criminalize all forms of lies and deceitful conduct, nor would this necessarily even be desirable. Such a position is not being advocated here. One of the purposes behind the criminal law, after all, is the maximization of society's general welfare and functioning. This is one of the reasons why alcohol (a contributing factor to domestic violence, depression, and general crime) is not illegal and why the speed limit for vehicles is  $x$  mph when a speed limit of *less-than- $x$*  mph would be preferable and would actually reduce accidents and deaths.<sup>174</sup> At a certain point, the law makes the conscious (or perhaps unconscious) decision of allowing individuals to pursue potentially harmful activities because total prohibition of such activities may set back general happiness and welfare far more than the allowance for that activity. In the end, it is a balancing act. Tobacco use, for instance, is not illegal. However, smoking is regulated in terms of the age of who can smoke and where they can smoke. Because we live in a pluralistic society with competing notions of right and wrong, the criminal law cannot be fitted to match moral condemnations of lying.

However, the sheer prevalence of lying in society does not necessarily make it correct or acceptable conduct. The fact that lying has become a habit for some, and is implicitly condoned in certain contexts, should not shield it from the criminal law. Unlike certain substantive crimes such as murder and burglary, where the act invariably produces a negative result for the victim, lies are a very different animal: in order for a lie to take effect, it

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<sup>171</sup> See Steven R. Morrison, *When is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 MARSHALL L.J. 111, 140–41 (2009).

<sup>172</sup> BOK, *supra* note 169, at 30–31.

<sup>173</sup> *Id.* at 43.

<sup>174</sup> *Id.* at 47.

requires interaction between the liar and the victim, and that interaction can take a variety of different forms. And herein lies the crux behind the law's indifference and hesitation to prosecute liars: there is a vast range of motivations behind lies, and the interaction between the liar and the "lied-to" takes on very different manifestations so that it renders the task of pinpointing which types of lies are criminal and which are not extremely difficult. What we need then is a way to classify various types of lies so that we may single out those that may justifiably be made subject to criminal sanction.

#### B. CLASSIFYING LIES

American legal scholar Steven Morrison has developed a useful classification of lies; he believes that not all lies are created equal in that there are degrees of seriousness. His classification of six types of lies ranging in order from the most serious (and least justifiable) to least serious (and most justifiable) are: (1) lies that harm another person or entity; (2) lies that benefit the liar; (3) lies that benefit another person or entity; (4) lies that avoid harm to the liar; (5) lies that harm only the liar and (6) lies that are designed to avert harm to another person or entity.<sup>175</sup> This continuum serves as a particularly helpful breakdown of different types of lies as it shows that a single law cannot be designed to deal equal treatment to them all. Morrison goes so far as to state that if the role of the criminal law is to maximize society's happiness and safety as well as achieving efficiency, then lies in categories two through six should *not* be criminalized.<sup>176</sup> If a lie confers a benefit, reduces a harm for anyone, or both, it should be encouraged and even celebrated.<sup>177</sup>

It is clear from Morrison's classification scheme that not all lies are identical in terms of the harm they produce. Thus, lying should not be criminalized generally save for exceptional and narrow circumstances. Indeed, we must proceed with extreme legislative caution. Every effort should be made to delineate minimally the context in which lies can be made criminal. It is submitted here that lies should only be criminalized if they are intended to cause serious harm and if said harm results.

While many might make the (rather grand) assumption that everyone to whom a statement is directed has a right to know the truth, the criminal law cannot be so generous in this assumption and render criminal every type of lie. Morrison's classification of lies is particularly useful here in determining which type of lies may be justifiably criminalized. It may

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<sup>175</sup> Morrison, *supra* note 171, at 146.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

appear to be a matter of controversy to deliberate on the notion that not everyone has an equal right to know the truth, but the fact of the matter is that certain lies can be tempered or justified by outstanding moral advantages in terms of the lie's positive consequences. To use Kant's example again of the murderer who arrives at one's doorstep inquiring into the whereabouts of his intended victim, very few people would contend that the murderer has a right to know the truth, and most would have no moral qualms about lying to the murderer. The Nazi officer does not have a right to know that Jews are sheltered in the attic. Most would likely agree that lying here would be the "right" course of conduct. This is a lie that fits neatly into Morrison's sixth category: lies that are designed to avert harm to another person or entity. This is the most benign class of lies.

Consider a heavy smoker who slightly underrepresents her consumption of cigarettes to her doctor. In Morrison's classification, this would be a fifth category lie: a lie that harms only the liar. This is relatively harmless (in terms of harming others). Suppose you are approached by a thief who demands that you hand over your wallet, and you assert that you do not have the wallet on your person (when in fact you do). Again, as in the case of the murderer, most people would not shower the liar with criticism since our baseline assumption and belief is that the thief does not have a right to know the truth. This type of lie would fall into the fourth category: lies that avoid harm to the liar. This lie is justifiable. Now consider the case of a doctor who conceals from a sick patient the death of her beloved daughter. Here, while the probable gain from the lie is very real, it is counterbalanced by the seriousness of the lie. The decision to lie in this case would not be an obvious or easy choice and most people would think very carefully before perpetrating the lie. This is a category three lie: one that benefits another person or entity. The reason that this type of lie becomes more difficult to justify is because our instinctive reaction points to the fact that the other person has a right to know the truth and make deliberations on his own accord—to strip this away is, in a sense, to perpetrate a greater harm. A category two lie, one that benefits the liar, would include examples of where one whips up outlandish lies about his background and credentials to other guests at a function. While no direct harm is done unto the victims, by projecting a hyped-up image of himself, the liar deprives the victims of the opportunity to formulate their own independent perspectives on the speaker, itself a kind of harm.<sup>178</sup>

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<sup>178</sup> Whether the victim can claim a right to know the truth may vary depending on the nature and intimacy of his relationship with the liar. One may assert that attendees at a party do not have a "right" to know the truth about another's background but we could comfortably contend that a prospective employer could claim such a right.

And lastly, the class of lies that are the most serious according to Morrison are category one lies: those that directly harm another person or entity. This is the type of lie perpetrated by Bartley in the introductory paragraph, and is the least justifiable. And so it would appear that from a bare, instinctive level, lies in categories two through six—lies born of self-aggrandizement, paternalism, self-protection, and altruism—do not necessitate the sanction of the criminal law (where category six lies may even be encouraged in some circumstances), while lies that fall under category one may and should be criminally sanctioned.

### C. EGREGIOUS LYING CAUSING SERIOUS HARM: THE ELEMENTS OF THE CRIME

With all this in mind, let us now lay out the precise elements of our proposed crime. The *actus reus* of the crime of egregious lying causing serious harm may constitute explicit communication of a lie in speech or written form where actual harm results. The *mens rea* will be specific intent (not recklessness or negligence) with reasonable foreseeability of serious harm.

The statute could be framed in the following manner:

A person is guilty of egregious lying causing serious harm when he knowingly lies to another person: (1) with the intent to cause serious harm to that person; and (2) serious harm occurs as a result of the lie. As used in this section, a “lie” means a false statement made to another person in oral or written form.

The crime thus has four components contained in its two elements. In terms of the *actus reus*, the state is required to prove that (1) the individual made a false statement to another person and (2) serious harm resulted to that person. The *mens rea* requirement is that (1) the individual made the false statement knowingly and (2) the individual intended to cause serious harm. It is not necessary, however, that the exact harm which occurred was specifically intended; it is enough that harm of the same degree of seriousness was intended to be a result of the lie.

The exact punishment applicable to the offense would have to be decided upon by the legislature and the courts. This could range from a simple fine to actual imprisonment depending upon the seriousness of the harm produced. It would be beyond the scope of this Article to define the exact meaning of “serious harm.” Lying that is intended to cause severe psychological injury or mental distress as exemplified by the example of Bartley in the introductory paragraph would constitute an appropriate starting point. But one can conceive of numerous other scenarios in which significant injury results from an intentional lie—for instance, loss of opportunity as evident in several of the other examples of malicious lying depicted in the outset of the discussion. Of course, allowing for loss of

opportunity to constitute “serious harm” could run into the slippery slope arguments stated above, and additionally could create overlap with various fraud statutes that criminalize deception that causes a loss of an economic nature. Again, this simply illustrates that the exact meaning of “serious harm” will be difficult to define with precision and would best be left to case law to be better sharpened and refined.

At this point, it is important to emphasize that it is lying in written and spoken form that is to be criminalized, and not misrepresentation or misleading statements (whether acts or omissions). This is because lying constitutes a subset of deception. Deception involves a much wider range of behavior that can encompass an unlimited variety of means and devices by which the deceiver can generate false impressions on others’ minds. To criminalize deception in general would be to cast far too wide a net that would invariably run the risk of legislative overbreadth. For this reason the elements of the crime are precise, and require that the offender overtly lied, and in lying intended to cause harm, and that harm actually occurred. This last component further limits the scope of the offense by making it impossible to charge an individual with an attempt under this crime.

#### D. THE DISTINCTION BETWEEN LYING AND DECEPTION

Thus, while the crime of egregious lying concerns lies in spoken or written form, it distinguishes between lying and general deception. There are practical considerations underlying this that should be briefly discussed here. As we stated, criminalizing the act of lying might very well walk the courts into a legislative minefield in terms of adjudication. It is therefore essential to narrow the scope of such legislation to include only the most egregious and narrowly defined forms of lying. Lying is a largely unambiguous act. Deception, on the other hand, comes in a variety of forms; it can involve the making of false statements, asking a question, statement of opinion, placement of objects, issuing a command, or engaging in various other kinds of verbal and non-verbal behavior. A famous example of a deception that does not involve a lie per se imagined by Kant is one where A deceives B into believing that he is headed on a journey by packing a suitcase and leaving it for B to see, hoping that B will draw the intended conclusion.<sup>179</sup> If John knows that he was in London on Valentine’s Day but tells Mary that he was “either in London or Cambridge that night,” he has certainly deceived Mary by leading her to assume that he either does not know or is uncertain about his whereabouts on that day. While he is being deceptive, he has not necessarily lied as his statement can be construed as literally true.

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<sup>179</sup> See Green, *supra* note 91, at 163.

Some legal philosophers like Stuart P. Green assert that misleading will always be less clearly a malicious act than lying is due to the principle of *caveat auditor*, which avows that in certain circumstances the listener bears the responsibility for confirming the truthfulness of a statement before it is taken to be the truth.<sup>180</sup> Unlike those who are lied to, the deceived is partly an architect in his own deception. Although confronted with misleading evidence, he is nonetheless free to draw conclusions of his own choosing (if he should draw any at all). This presence of an “invitation to draw inferences” is a crucial distinguishing factor between lies and non-communicative deception.

When dealing with general deception broadly defined, we are wandering into murky terrain. It may not always be clear where such deception has even occurred. Thus, an overt verbal lie offers itself up as a concrete, unambiguous action that may be narrowly targeted. To open the offense up to deception in general would be to at once jettison the important element of preciseness, without which the risk of judicial overreach (not to mention the logistical hurdles in proving the *actus reus*) would simply become too great. It is primarily for this reason that the crime conceived of here is limited to overt, unambiguous lies, written or oral, unlike the offense of fraud, which allows for more general deceptive forms of conduct.

It should now be clear how useful Morrison’s classification of lies is to the present discussion; the crime of egregious lying proposed here exclusively targets lies of a category one nature under Morrison’s hierarchy—lies that harm another person or entity. However, even within this class, not all lies of this kind necessarily call for criminal punishment. As we have noted, the lie must be of a particularly serious nature. The proposed scope of the crime advocated here is thus extremely narrow—only a very limited number of extremely egregious acts would be subject to criminal sanctions. This hinges upon the seriousness of the harm produced by the lie. However, having established what kinds of lies should be subject to criminal liability (i.e. ones that create serious harm to another person), we must now clarify exactly what degree of harm is needed to elicit such sanctions. To be sure, not all lies of even a category one nature should be criminalized—only lies that cause significant injury to another individual. What is left for us to do is to set out precisely the degree of harm required to trigger criminalization. To do this, we turn to Feinberg.

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<sup>180</sup> IMMANUEL KANT, LECTURES ON ETHICS 226 (Louis Infield trans., 1963).

E. FINDING THE CORRECT BALANCE: FEINBERG'S MEDIATING  
MAXIMS AND THE CRIMINALIZATION OF LYING

While Morrison's classification is extremely useful in delineating different types of lies, its usefulness stops there as it fails to explain precisely what level of harm is needed to trigger criminal sanctions. While the example of Bartley was fashioned with the intent to provoke a negative reaction regarding Bartley's conduct, one can conceive of numerous instances where lies that harm another person should clearly not be made criminal. Husbands lie to their wives about their whereabouts when in fact they are having affairs; friends help friends cover up their drug or gambling addictions (which in the long run may harm the very people they are protecting); everyday gossip at school and in the workplace can lower self-esteem and create discomfort. These lies all produce harm; however, they should not be criminalized, as the harm they produce is not serious enough to warrant such an extreme response. The question then becomes: what degree of harm should trigger criminal sanctions? How serious does this harm have to be? Where can a conceptual line be drawn between reasonable criminal protection and the court wildly overstepping its bounds? It is essential that we pinpoint the correct balance between these two extremes.

Joel Feinberg offers the conceptual framework that may guide us in making such an assessment. How we may demarcate between the classes of harms with which the criminal law is concerned and those that the law can safely ignore is something Joel Feinberg attempts to resolve.<sup>181</sup> This is born out of his overarching project to find a general answer as to what sorts of conduct the state may rightly make criminal.<sup>182</sup> As a nod to John Stuart Mill, Feinberg states:

Generalizing then from the clearest cases of legitimate or proper criminalization, we can assert tentatively that it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices. In short, state interference with a citizen's behavior tends to be morally justified when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as effective) to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate *reason* for legal coercion.<sup>183</sup>

While the harm inherent in the class of crimes involving homicide, forcible rape, battery, and aggravated assault is clear, the "harm principle"

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<sup>181</sup> 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 1 (1984).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 11 (emphasis in original).

is designed to guide legislators along in deciding whether to criminalize conduct that is more “fuzzy.” Where John Stuart Mill argued that the harm principle is really the *only* determinative principle which justifies invasions of liberty, so that conduct which falls short of satisfying its terms cannot be made criminal,<sup>184</sup> Feinberg contends that the harm principle must be considered alongside and aided by supplementary criteria or “mediating maxim[s].”<sup>185</sup> According to Feinberg, while the harm principle is a valid legislative principle and serves as a useful starting point, it is not sufficient on its own and must be modified by other criteria.<sup>186</sup> Taken in conjunction with Morrison’s classification of lies, Feinberg’s mediating maxims provide a clear set of parameters upon which we may construct the crime of egregious lying.

### *I. Not Just Annoyances*

One mediating maxim is that in order to warrant legal coercion to prevent certain conduct, the magnitude of the harm must be great and stand beyond the mere annoyances, hurts, offenses, and inconveniences that come with life, as “[c]learly not every kind of act that causes harm to others can rightly be prohibited, but only those that cause avoidable and substantial harm.”<sup>187</sup> Unpleasant sensations and unhappy (though not necessarily harmful) experiences can be divided into two categories: “those that *hurt* and those that *offend*.”<sup>188</sup> Feinberg attempts to draw a distinction between genuinely harmful conditions and all the various unhappy and unwanted physical and mental states which fail to constitute states of harm, as “[t]hese experiences can distress, offend, or irritate us, without harming any of our interests.”<sup>189</sup> The legal maxim *de minimis non curat lex* (“The law does not

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 187.

<sup>186</sup> *See id.* at 188–206. Feinberg’s mediating maxims include: the magnitude of the harm; the probability of the harm; aggregative harms; statistical discrimination and the net reduction of harm; and the relative importance of the harm. For a good overview of these concepts, see NINA PERŠAK, CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS 56–57 (2007). Only those maxims most pertinent to the topic at hand will be discussed in greater detail, however.

<sup>187</sup> *Id.* at 12.

<sup>188</sup> *Id.* at 46 (emphasis in original).

<sup>189</sup> *Id.* at 45. He draws a non-exhaustive list of unpleasant physical and mental states. Physical discomfort can include: pangs, twinges, aches, stabs, stitches, cricks, throbs, muscle spasms, gas pressures, itches, dizziness, tension, fatigue, chills, weakness, sleeplessness, stiffness, etc. Mental suffering can include: bitterness, keen disappointment, remorse, depression, grief, heartache, despair, shocked sensibility, alarm, disgust, frustration, impatient restlessness, acute boredom, irritation, embarrassment, feelings of guilt and shame, etc. *Id.*

concern itself with trifles”)<sup>190</sup> supports this mediating maxim, as it is thought that interference with the trivial will actually cause more harm than it prevents. Indeed the drafters of the Model Penal Code stated plainly the importance of what they called the “*de minimis* principle”—that trifling wrongs should not be the subject of the law.<sup>191</sup> This is generally consistent with the stated view in this thesis—that the magnitude of the harm created by the lie must be great and not be mere hurt or distress. This Article does not contend that all lies should be made criminal; criminality should be confined entirely to lies that cause substantial harm.

### 2. Risk Versus Probability of Harm

Another mediating maxim is that the legislator must be alert to the risk of the harm. This is a combination of the magnitude and the probability of the harm.<sup>192</sup> Feinberg uses the example of the act of shooting a rifle randomly in the air; while there is negligible inherent value in the act (save perhaps for some diversionary value to the shooter), this must be balanced against the substantial risk (low probability but high magnitude of harm) that the act creates.<sup>193</sup> On the other hand, the risks taken by ambulances in driving past the speed limit and ensuring expeditious delivery of patients to hospitals is justified by the greater social value of that conduct.<sup>194</sup> If we combine this mediating maxim with Morrison’s categorization of lies, it is evident that while it can be said that there is some social value in category six lies (lies to the murderer), it is more difficult to offer a justification for category one lies. It is difficult to imagine that lies that harm another person or entity (without any corollary benefits) would have any inherent value, save a morbid pleasure for the liar. Additionally, there is substantial risk in this conduct as compounded by high probability and high magnitude of harm (high probability because the chance of a lie being believed and relied on by the victim is far greater than that of a rifle hurting a bystander when shot randomly into the air). Therefore, only category one lies should be made criminal.

### 3. Aggregative Harms

Directly related to the above maxim is another consideration for the legislator—that of aggregative harms. Lawmakers must consider the general harm that allowance for certain conduct may create alongside

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<sup>190</sup> BLACK’S LAW DICTIONARY 464 (8th ed. 2004).

<sup>191</sup> MODEL PENAL CODE § 2.12 (1962) (De Minimis Infractions).

<sup>192</sup> FEINBERG, *supra* note 181, at 191.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

specific instances of the conduct that can actually be innocuous.<sup>195</sup> Alcohol consumption is a good illustration of Feinberg's point here. It is not a bone of contention that more harm overall is created by alcohol consumption than would occur if it were made illegal. But should alcohol be banned across the board, the vast majority of people who *do* control their consumption levels and who *do* behave responsibly while drinking will be deprived of their innocent pleasures.<sup>196</sup> It would be unfair that everyone should have their privileges stripped away simply because a few others behave badly. Those who oppose the criminalization of lying may utilize this maxim in contending that lying should not be criminally prosecuted by noting that the vast majority of lies are harmless and innocent. This argument would have sway if it were the contention of this Article that *all* lies should be criminalized. However, this Article has strongly advocated for a clear demarcation of different types of lies so that only the *most serious* kind intended to cause egregious harm to another may even stand the chance of facing criminal sanction. While alcohol consumption has some social value for the vast majority, it is not so evident that lying with the intent to cause egregious harm to another engages a recognizable and justifiable pleasure that can outweigh the deprivation of this "pleasure." In comparing the relative importance of conflicting interests, it would be difficult for one to justify why A's interest in telling the lie would be greater than B's interest in being protected from the lie.<sup>197</sup> It is clear then that the general tenor of this Article and the call for criminalizing lying in certain contexts coheres generally with the harm principle, and more specifically, with Feinberg's mediating maxims.

Together, Morrison and Feinberg provide ample theoretical guidance to structure the crime of egregious lying. Morrison's classification of lies identifies the type of lies that may trigger criminal sanctions—lies that harm another person or entity. Feinberg's mediating maxims then further refine this category by pinpointing the exact level of harm that is required by considering its degree, probability, and the aggregate cost-benefit of targeting that harm. This framework allows us to narrow the scope of the offense to a particular conduct resulting in a very specific level of harm.

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<sup>195</sup> *Id.* at 193.

<sup>196</sup> *Id.* at 194.

<sup>197</sup> One possible way that a category one lie may be justified is if the motivation behind the lie is not purely to harm another but is combined with the motivation to avert harm to a third party. It is beyond the scope of this Article to discuss how a combination of different motivations may shift the categorization of lies in terms of seriousness and justifiability but this is a point that cannot go ignored.

## F. THE CRIMINAL LAW OR TORT: WHICH CAN PROVIDE BETTER REDRESS?

The last point we should address is a general one: broadly speaking, is the criminal law even the most appropriate venue in which to deter individuals from engaging in egregious lying? Are there less intrusive ways to do this other than with the heavy-handed force of the criminal law? It is important to note that the legal system currently operates on two very distinct sets of rules designed largely to achieve the same goal—to deter people from harming others by imposing costly sanctions. To achieve this end, we have both civil and criminal law. The punitive element within civil law is evident in the use of punitive damages for conduct that is particularly egregious and displays either a malicious intent, gross negligence, or a willful disregard for the rights of others. Some who advocate for constraint rather than expansion of the criminal law, as discussed above, may contend that the criminal law is not the correct forum to address certain types of misbehavior.<sup>198</sup> The reasoning behind this is the concern that a gradual expansion of the criminal law would inevitably latch onto behavior that does not require or deserve criminal punishment.

There is validity to this view. At the same time, however, there is a very real danger that the civil tort system “under-punishes” and fails to provide adequate redress for the wrongs that people commit. The reasons that the crime imagined in this paper should be addressed by the criminal and not merely the civil law system are three-fold: the criminal law delivers real sanction that the civil law does not; shame and stigma accompany criminal punishment; and criminal prosecution is not dependant on a willing victim to pursue punishment.

As Robert Cooter explains, in its classic operation, the civil law “prices” while the criminal law “sanctions.”<sup>199</sup> While the criminal law is fashioned to ensure that certain types of behavior cease completely, the civil law is more concerned with pricing people out of that very behavior; the civil law does not want to stop people from driving—its goal is just to put an end to reckless and dangerous driving.<sup>200</sup> The criminal law then has the unique ability to assign blame and censure with a moral force that the civil law cannot. It effectively sends the message that it is prohibiting behavior which lacks *any* social utility. Moreover, the criminal law often metes out punishments much more serious than damage costs issued in civil law. Suppose Bartley’s goal was to aggrieve and cause severe harm: the victim may sue Bartley in tort, but if the latter’s main goal was achieved and he

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<sup>198</sup> See Coffee, *supra* note 137, at 1875.

<sup>199</sup> *Id.* at 1876.

<sup>200</sup> *Id.*

does not mind paying compensation, then he will be largely unaffected by civil law sanctions. If Bartley were extraordinarily wealthy, a civil decision would provide little deterrent effect—this may just be the price of the “great fun” of psychologically torturing another individual or destroying their life.

Crime is also seen as a moral fault and carries with it the weight of shame and stigma that the commission of a tort simply does not.<sup>201</sup> After all, accusing one of being a criminal is much more of an assault on her character than accusing her of being a tortfeasor. Shame and stigma also have an added deterrent value that the civil law lacks. Additionally, victims may not have sufficient resources to prosecute and chase after offenders; the defendant may be judgment-proof (e.g., the defendant is insolvent), giving little incentive for the victim to bring the defendant to civil court. Under the criminal law system where the state initiates proceedings, these problems can largely be assuaged as victims do not have to be concerned with the costs of proceedings, the defendant’s financial state, and the general “risk” of going to trial.

It should be noted that all of these reasons are again consequentialist in nature, with deterrence being the overarching objective. Conduct capable of causing serious injury to another should not be confined solely to civil law penalties. It is well and good for the act to have repercussions in tort; however, it should also have its due reflection in the criminal law, for it is here that such conduct may be properly sanctioned and an effective punishment meted out.

#### IV. CONCLUSION

Some scholars believe that the current project of the criminal law should be to narrow its scope, avoid overcriminalization, and lessen the penalties on behavior which is largely acceptable. While the ethos of this Article will sadly dishearten these scholars, the project as a whole should not disappoint those who want to know just under what circumstances lying may be criminalized, why one’s interest in being protected from harm can override another’s freedom to lie, and *just how good* of a reason the harm principle is as a justification for protecting one party from another. While there is no clear objective method for weighing the relative importance of conflicting interests and the degree to which their advancement or frustration can impact the agent, clearly a consequentialist approach that employs Feinberg’s reasoning not only justifies, but demands the criminalization of certain egregious forms of lying. If the function of criminal law is to prevent harm by deterring individuals from engaging in

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<sup>201</sup> See Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 729 (2008).

certain forms of conduct, then our laws would be remiss to not make lying subject to criminal sanction in certain egregious cases.

While there are very real benefits that accompany lying, and a blanket prohibition of the conduct would likely wreak havoc on all social interactions, there are yet very real distinctions between the various motivations driving the lie and, more importantly, the degree of harm that may result. Situated at the extreme end of the spectrum are genuinely problematic cases where the harm perpetrated on the victim is serious enough to warrant the proscriptive power of the law. The criminalization of lying within the private context would be a challenging case for any legislator, but it is submitted that in the limited circumstances in which this crime can arise, the defendant really cannot claim *any* active interest in saying whatever it is she wishes, especially when the interest of another in not being assailed is so great and arguably more vital.

