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The Law of Deception: A Research Agenda

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THE LAW OF DECEPTION: A RESEARCH AGENDA

GREGORY KLASS*

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Many laws address deception. Familiar examples include: the torts of deceit, libel and defamation; the crime of theft by false pretenses and federal mail and wire fraud statutes; the Federal Trade Commission Act, the Lanham Act, and state unfair and deceptive acts and practices laws; laws prohibiting securities fraud and requiring issuer disclosures; the contract defense of misrepresentation; and the law of perjury. Less familiar examples include the Organic Food Production Act of 1990, which prohibits misleading uses of "organic" on food labels;[1] the Indian Arts and Crafts Act, which provides for civil and criminal penalties against those who pass off goods as Indian products;[2] section 340 of the Immigration and Nationality Act of 1952, which provides for the

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* Agnes N. Williams Research Professor, Professor of Law, Georgetown University Law Center. I am grateful for feedback from participants at the Rothgerber Constitutional Law Conference at the University of Colorado Law School in April 2017, as well as comments from Ann Lipton and Justin Marceau. The paper also benefited greatly from my participation in the Deception Roundtable organized by Woodrow Hartzog and Mark McKenna and sponsored by the University of Notre Dame Law School in May 2016.

1. Organic Foods Production Act, 7 U.S.C. §§ 6501–24 (2012).

2. The Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified as amended at 25 U.S.C. §§ 305, 305d, 305e (2010)).

denaturalization of individuals whose citizenship was procured by concealment of material facts or willful misrepresentations;[3] and section 508 of the Communications Act of 1934, which makes it a federal crime to rig a game show.[4]

Although these laws are rarely studied or taught together, they collectively constitute a coherent body. The law of deception, as I use the term, comprises laws that regulate the flow of information to prevent or remedy dishonesty, disinformation, artifice, cover-up, and other forms of trickery, as well as wrongfully caused mistakes, misunderstandings, miscalculations, and other types of false belief.[5] On that definition, the law of deception includes more than laws addressing lies and other misrepresentations. Falsehoods are but one way that a person can cause a false belief in another. Thus false advertising law recognizes that a literally truthful advertisement can cause consumers to draw false inferences; tort law recognizes that concealing a fact can be as wrongful as lying about it; and disclosure duties recognize that the failure to act can also cause false beliefs in others. The law of deception includes these and other laws that target deceptive acts and omissions.

This Essay argues that legal scholars and jurists would do well to think about the law of deception as a whole.[6] My claim is not that the law of deception is one single thing. I doubt that there is a master principle or purpose that runs through all laws that target deceptive behavior.[7] But one finds a

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3. 8 U.S.C. § 1451 (2012). *But see* Maslenjak v. United States, 137 S. Ct. 1918, 1930–31 (2017) (resolving an interpretive question and holding that false statements must directly lead to naturalization to be a basis for conviction).

4. 47 U.S.C. § 509 (2012).

5. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 449–50 (2012).

6. For two important recent works in the area, see EDWARD J. BALLEISEN, FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF 179 (2017) and SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY AND THE LAW (2014).

7. The same might be said of other areas of law commonly treated as unified wholes. The law of contracts covers everything from informal transactions between family members to employment agreements to highly negotiated long-term supply agreements between multinational corporations. There is little reason to think that the social interest in enforcement is the same across such different transactions. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017). And yet one learns something by thinking about the law of contract as a whole—even if part of the lesson is about differences within the category.

constellation of design problems and theoretical questions reappearing throughout the category. A syncretic approach illuminates characteristic challenges lawmakers face when designing laws of deception, the range of design solutions to them, and the social and political interests that legal regulation of deceptive behavior implicates.

The bulk of this Essay, comprising Parts II and III, describes four clusters of issues that reappear across the law of deception. The first, which is the focus of Part II, concerns rules of interpretation. Before a fact finder can determine whether a statement is false, she must interpret what it means. Different laws of deception incorporate different rules of interpretation. Depending on the cause of action, legal liability might turn either on a statement's literal meaning or on contextually determined implied meanings. And a few laws of deception also impose legal default representations. Although scholars have written volumes about the legal interpretation of constitutions, statutes, contracts and other types of legal speech acts, we still lack a complete understanding of how interpretation works in the law of deception. Different laws of deception employ different approaches to interpretation. It is worth thinking systematically about how and why.

Part III describes several ways in which laws of deception reflect a commitment to both speaker and hearer autonomy.[8] Section III.A examines the sorts of harms laws of deception are designed to prevent or remedy. I distinguish four types: harms to those deceived; harms to persons about whom a falsehood is told; harms to honest market participants; and harms to the communicative environment (which might not be a legally cognizable harm). Understanding which harms a law of deception targets is essential to determining how it should be designed, as illustrated by some of the current confusion in the area of securities fraud. Identifying legally salient harms is also essential to determining an outer boundary for laws of deception, as shown by the Supreme Court's decision in *United*

8. I use "speaker" and "hearer" in this Essay as generic terms to refer respectively to someone who performs a communicative act and to someone who observes or receives that communication. Speakers in this technical and generic sense can communicate through speech, writing, gestures and even meaningful silences.

States v. Alvarez.[9] *Alvarez*'s application of the harm principle affirms the importance of speaker autonomy.

Section III.B examines the maxim that deception vitiates consent, which appears in various guises in tort law, contract law, the crime of rape, and Fourth Amendment jurisprudence. Here there is a theoretical puzzle: it is difficult to say whether tort cases invoking the maxim turn on the wrong of deception, on the mistake that the deception causes, or on some mixture of the two. There is also a practical problem: although there is widespread agreement that not all deception vitiates consent, it is not yet obvious where or how to draw the line. The recent decision in *Animal Legal Defense Fund v. Herbert* illustrates both the limits of current line-drawing strategies, and reasons the law might sometimes permit deceptive manipulation.[10]

Section III.C is also about consent, but comes at it from the other side: Should the law empower parties to contract out of liability for deceptive acts? In other words: Should the law recognize consent to being deceived? Here I identify three salient factors: the purpose of the law of deception, the type of deceptive act or omission at issue, and whether there is a reliable test for when parties have agreed to contract out. The last factor reintroduces problems of interpretation. These factors generate different answers for different laws of deception.

The Essay as a whole suggests that individual freedom figures into the law of deception in at least three ways. Legal prohibitions on deception and the rule that fraud vitiates consent are partly justified by the fact that deception interferes with the autonomy of the deceived. Constitutional limits on laws of deception derive in part from our polity's commitment to speaker autonomy. And a commitment to individual autonomy further suggests that parties should sometimes have the power to contract out of laws of deception.

This Essay's approach is exploratory. I seek to identify some important questions about laws of deception, not to provide definitive answers to them. And these are not the only questions one might ask. It would also be interesting to say more about the various ways that reliance figures into different laws of deception, the variety of scienter requirements, how the

9. 567 U.S. 709 (2012).
10. No. 2:13-cv-00679-RJS-EJF, 2017 WL 2912423 (D. Utah, July 7, 2017).

law handles cases where it is difficult to verify whether a statement is true or false, special procedural protections such as the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) or anti-SLAPP (strategic lawsuits against public participation) laws, differences between how the law treats deception between private parties and deception of and by the government, and of course remedies. That said, the issues I discuss suffice to make the case for thinking about the category as a whole.

As noted above, the major part of this Essay's analysis appears in Parts II and III. Before getting there, it is necessary to say a few words about the idea that there is a distinctive thing we might call the "law of deception." This is the project of Part I, which defines the object of study and discusses some boundary issues.

I. WHAT IS THE LAW OF DECEPTION?

I will use "deception" to mean an act or omission that wrongfully causes a false belief in another.[11] The *law of deception* comprises laws designed to prevent, punish, compensate for, or otherwise address deception.

So defined, deception need not involve a lie, and not all lies count as deception. A lie is a false statement made with knowledge of the truth and with an intent to deceive.[12] A negligent or innocent misrepresentation might be deceptive, though it is not a lie. So too might a wrongful failure to correct another's false belief. Both constitute deception without lies. Alternatively, a lie might have no chance of being believed. Lies by small children are obvious examples, though there are others. Such lies do not count as deception as I am using the term.

It is sometimes difficult to disentangle deceptive acts from deceptive omissions. A literally true statement, for example, can deceive if it fails to include all the relevant information. In

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11. My definition is similar to Seana Shiffrin's use of the term: "I propose . . . that the wrong of deception, when it is wrong, properly focuses on the violation of a duty to take due care not to cause another to form false beliefs based on one's behavior, communication, or omission." SHIFFRIN, *supra* note 6, at 22.

12. This definition is somewhat narrower than Shiffrin's conception of lying. For Shiffrin, a liar need not intend that she be believed. *Id.* at 13. Shiffrin also discusses the difference between lies and deception. *Id.* at 19–21.

a classic example, the seller of a piece of real estate might mislead a buyer by disclosing that two roads are planned nearby but not mentioning a third that will run through the property.[13] In volunteering the information about the two roads, the seller implicitly represents that she is sharing all the relevant information on the subject. Such "half-truths" deceive by saying too little rather than saying too much. Alternatively, if a statement that the speaker believed to be true turns out to be false, the speaker might have a duty to correct it.[14] Thus if the seller of a mobile home park tells a buyer that the septic system is in good condition and then learns of problems before closing, the seller has a legal duty to share that information.[15] Again, the deception happens through a combination of act and omission. Finally, in some contexts, the law simply requires disclosure, no matter what else is said. If the seller of a residential home is aware of termite damage, she might have a duty to share that information with the buyer—regardless of what else she has said about the quality of the property.[16] The above definition of "deception" includes both acts and omissions so as to capture these and related phenomena.

Sometimes an act or omission causes a false belief, but we hesitate to call it "deception." I keep an umbrella in my office. Suppose I use it to walk home in the rain Monday evening. Tuesday morning, I bring the umbrella back to the office, and my colleague Naomi sees me carrying it. Naomi knows that I pay close attention to the forecast and mistakenly infers that I have brought the umbrella because it is likely to rain. My act of carrying the umbrella has caused Naomi to adopt a false belief. But have I deceived her?

"Deception" is a word like any other. If we want to use it to describe the relationship between my carrying the umbrella and Naomi's false belief, we can do that. But the category of deceptive acts and omissions will then grow very large. Nor will it bear a natural relation to behavior that the law does or should target. I therefore use "deception" more narrowly to

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13. Junius Constr. Co. v. Cohen, 178 N.E. 672, 674 (N.Y. 1931).

14. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (AM. LAW INST. 1979).

15. Bergeron v. Dupont, 359 A.2d 627, 628 (N.H. 1976).

16. *See, e.g.*, Piazzini v. Jessup, 314 P.2d 196, 198 (Cal. Dist. Ct. App. 1957); Pywell v. Haldane, 186 A.2d 623, 623–24 (D.C. 1962); Smith v. Renaut, 564 A.2d 188, 192 (Pa. Super. Ct. 1989).

designate behavior that violates some duty—moral, legal or other. Causation alone is not enough. Deception is behavior that *wrongfully* causes a false belief in another. As I am using the term, I have not *deceived* Naomi by bringing the umbrella. I would deceive her if I carried the umbrella with the intent to fool her, or if I had a duty to prevent her from drawing the false inference.

It is also important to distinguish deception from manipulation more generally—a boundary line that reveals something important about why the law regulates deceptive practices. I will follow the Oxford English Dictionary and say that to *manipulate* another person is "to manage, control, or influence [that person] in a subtle, devious, or underhand manner."[17] Intentional deception often seeks to manipulate others. People lie to get others to do what they want. But not all manipulation involves deception. Advertising and branding, for example, can alter consumer preferences without inducing in them any false beliefs. In blind taste tests people prefer the taste of Pepsi to Coke, but in non-blind tests they prefer the taste of Coke.[18] It appears that Coca-Cola has succeeded through its advertising and branding campaigns in manipulating consumers' tastes and preferences. It is not obvious, however, that in doing so Coca-Cola has caused consumers to hold any false beliefs. It is possible to manipulate without deceiving.

The law sometimes targets nondeceptive manipulation. The Tobacco Master Settlement Agreement prohibits cigarette manufacturers from using "any Cartoon in the advertising, promotion, packaging or labeling of Tobacco Products."[19] That rule does not target deception. It is unlikely that anyone ever mistook Joe Camel for a real smoking dromedary. The purpose is to prevent the manipulation of children's preferences through the use of images they are likely to find attractive.

Regulating private nondeceptive manipulation generates difficult line-drawing problems. It is not surprising that the above example involves children. We are disposed culturally

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17. *Manipulate*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

18. *See* Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 513–14 (2008).

19. Master Settlement Agreement between Tobacco Manufacturers and the States 19 (1998) (prtg. 2014), http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf [https://perma.cc/Q9QP-VWSB] (§ III(b)).

and politically to trust adults to make decisions for themselves, even in the face of advertising and other attempts to affect their choices or alter their preferences. And we are often skeptical of state attempts to distinguish good preferences from bad. These cultural and political commitments to individual autonomy can make it difficult to distinguish acceptable forms of private nondeceptive persuasion from wrongful ones.[20] Consequently, although we might not like private, nondeceptive manipulation,[21] we rarely attach legal consequences to it.

Deceptive manipulation presents an easier case. First, intentional deception violates a familiar moral rule: Do not tell a lie. Although the law of deception, as I have defined it, captures more than lies, much of it can be justified by appeal to that rule.[22] There is broad agreement that deceptive manipulation is simply wrong. Second, folk psychology suggests it is more difficult to guard against deception than against other forms of manipulation. In *Gulliver's Travels*, Jonathan Swift famously depicts Lilliputian lawmakers' reasoning as follows:

> They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege, that care and vigilance, with a very common understanding, may preserve a man's goods from thieves, but honesty has no defense against superior cunning; and, since it is necessary that there should be a perpetual intercourse of buying and selling, and dealing upon credit, where fraud is permitted and connived at, or has no law to punish it, the

20. For an autonomy-based argument against regulating private manipulative speech, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 362–65 (1991). For some thoughts on the related but different question of state attempts to manipulate the choices people make, see CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE 11–17 (2016).

21. Consider, for example, the recent controversy over Uber's surreptitious use of "psychological inducements and other techniques unearthed by social science to influence when, where and how long drivers work." Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html [https://perma.cc/QZ3S-B2M6]. Thanks to Ann Lipton for suggesting the example.

22. Seana Shiffrin has, I think, done more than anyone else to tie various laws of deception back to the moral obligation not to lie. *See generally* SHIFFRIN, *supra* note 6.

> honest dealer is always undone, and the knave gets the advantage.[23]

We are social creatures who cannot help but rely on information we receive from others to navigate the world around us. Deception thus strikes at the heart of the faculty of reason, and so it is especially difficult to guard against. Third, prohibiting deceptive behavior does not threaten the familiar picture of legal subjects as autonomous and self-sufficient agents. To respect autonomy is to allow individuals to sometimes make bad choices. But a choice based on misinformation is not fully autonomous, especially if the misinformation was provided by someone attempting to influence the recipient's behavior. As David Strauss observes, "lies that are told for the purpose of influencing behavior . . . involve a denial of autonomy in the sense that they interfere with a person's control over her own reasoning process."[24] Deception therefore threatens hearer autonomy in a way other forms of manipulation do not. That fact is part of the justification for laws of deception.

There exist large literatures discussing specific areas of the law of deception. Scholars have written extensively on false advertising law, securities law, the federal mail and wire fraud statutes, mandatory disclosure rules, and other laws of deception. Most of these studies restrict themselves to a single region of the law of deception. Parts II and III make the case for thinking about the law of deception as a whole. Together they identify four issues that reappear in multiple laws of deception: interpretation, harm, the effect of deception on

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23. JONATHAN SWIFT, GULLIVER'S TRAVELS 48–49 (Arthur E. Case ed., The Ronald Press Company 1938) (1726). Sissela Bok, in her work on the ethics of lying, makes a similar point: "Both [deceit and violence] can coerce people into acting against their will. . . . But deceit controls more subtly, for it works on belief as well as action." SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18 (1978).

24. Strauss, *supra* note 20, at 354. Or again:

> The victim of a lie is denied that freedom. In making decisions, the victim is pursuing the liar's ends, not the victim's own. Lying creates a kind of mental slavery that is an offense against the victim's humanity for many of the reasons that physical slavery is. While it is hard to argue that lying is worse than physical slavery, lying has a peculiarly offensive quality because it denies the victim even the knowledge that he or she is being used by another.

Id. at 354–55.

consent, and consent to deception. These are not the only issues that cut across the category. And I will not attempt to provide a complete analysis of them. My aim is more modest: to convince the reader of the value of thinking across traditional doctrinal boundaries about the law of deception as a whole. Part II discusses interpretation, Part III the other three issues, each of which touches in its own way on autonomy interests.

II. INTERPRETATION

Laws of deception are often interpretive in the sense that their application requires a fact finder to interpret what one or both parties said or did. This Part explains why this is so, identifies several varieties of interpretation one finds in laws of deception, and discusses the choice between them.

A. *The Role of Interpretation in Laws of Deception*

As I am using the term, an act or omission is deceptive only if it causes a false belief in another. There are many different types of causation, from the influence of one billiard ball on another to the forces of history. In the case of deception, causation often happens through communication. Thus a simple case of deception might have the following structure:

A tells *B* proposition *P*;
As a result, *B* acquires a belief that *P*;
In fact *P* is not the case.

Not every form of deception fits this model. It does not capture, for example, all cases of wrongful nondisclosure. But it describes the basic communicative structure of many deceptive acts.

Communication requires interpretation. A hearer understands what a speaker says by interpreting the meaning of the speaker's words, acts or omissions. We might therefore unpack the simple case as follows:

A utters sentence *S* to *B*;
B interprets *S* to mean that *P*;
As a result, *B* acquires a belief that *P*;
In fact *P* is not the case.

Sometimes to determine that a speaker's utterance of a sentence *S* means *P*, it is enough to understand *S*'s literal meaning. If Naomi asks me, "Is the forecast for rain?" and I reply, "No," there appears little reason to read our exchange as saying anything other than the words' literal meaning. In other situations, people use words to say something other than or in addition to their literal meanings. Obvious examples include metaphor, irony and understatement. Implied meanings can also supplement literal ones. If Naomi asks me, "Is the forecast for rain?" and I reply, "No," we almost certainly both understand that we are talking about the local forecast in Washington, D.C. If it later rains and I make the excuse that I was speaking of the forecast for Flagstaff, Arizona, Naomi might rightly complain that I spoke deceptively. Implicit in our conversation, and my answer, was that we were talking about the D.C. forecast.

All this might seem obvious. But it highlights the role interpretation often plays in deception. Many laws of deception, in turn, ask decision makers to interpret potentially deceptive acts, with the aim of anticipating or reproducing the understanding of a possibly deceived hearer. To succeed in an action for the tort of deceit, for example, a plaintiff must show that the defendant made "a misrepresentation of fact, opinion, intention or law."[25] Proof of misrepresentation typically requires demonstrating three separate facts:

> *D* uttered *S* in circumstances *y*;[26]
> *D*'s uttering *S* in circumstances *y* meant *P*; and
> *P* was not the case.

The first and third inquiries are factual ones. Establishing the second requires that the fact finder interpret the defendant's words, actions or omissions.[27] This second inquiry puts the tort of deceit in the broader category of interpretive laws—laws whose application requires acts of interpretation.

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25. RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1979).

26. To keep things simple, the example assumes deception by false statement. One might complicate things by replacing "uttered *S*" by "uttered *S*, committed meaningful act *A*, or failed to *O*."

27. In earlier work I have called the second step the "representation inquiry," and the third step the "veracity inquiry." IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT 19–21 (2005).

B. *Varieties of Interpretation in the Law of Deception*

To say that a law's application involves interpretation is not yet to say what sort of interpretation. Rules of constitutional interpretation and construction differ from those governing statutes, which differ from those that apply to administrative regulations. One finds even more heterogeneity in the private law. There is a marked difference, for example, between the interpretive rules that apply to contractual agreements and those that apply to the tort of deceit.[28] There is also variety—and this is the central point of this Part—within the law of deception.

Let us begin with the tort of deceit. When one looks in the case law for rules of interpretation, at most one finds generic statements such as:

> The truth or falsity of representations for purposes of a fraud claim is judged in the light of the meaning which the plaintiffs would reasonably attach to them in existing circumstances and the words employed must be considered against the background and in the context in which they were used.[29]

As the passage suggests, the tort of deceit incorporates our everyday, nonlegal, context-sensitive interpretive practices. The meaning that matters is the meaning a reasonable person would attribute the words in the circumstances. This explains why the seller who tells the buyer of two planned roads might commit deceit if she does not mention a third.[30] Even if the statement is literally true, an ordinary hearer is likely to understand it to imply that the speaker has disclosed all the relevant information on the subject—that there is not a third planned road.

This is not to say that the common law of deceit leaves fact finders at sea when determining the meaning of what a defendant said or did. The cases contain many judicial observations on what constitutes puffery or sales talk, about

28. Klass, *supra* note 5, at 455–56.

29. Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 133 (Mo. 2010) (quoting Haberstick v. Gordon A. Gundaker Real Estate Co., 921 S.W.2d 104, 109 (Mo. Ct. App. 1996)).

30. *See supra* pp.711–12 ("road" hypothetical).

when a statement of opinion may be actionable, about how half-truths can mislead, and on other interpretive questions. In the end, however, the interpretive rule is one of reasonableness: How in the circumstances should the defendant have expected the plaintiff to understand the defendant's words, acts and omissions? Common law actions for deceit turn on the everyday, contextually determined understandings of what was said.

Other laws of deception employ different rules of interpretation. When applying the federal perjury statute, for example, all that matters is the literal meaning of the witness's words. In *Bronston v. United States*, the Supreme Court considered the following colloquy with the defendant in a bankruptcy proceeding:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
> A. No, sir.
> Q. Have you ever?
> A. The company had an account there for about six months, in Zurich.[31]

Although it was true that the company had used a Swiss bank account, the defendant also had opened a personal one. Before the case reached the Supreme Court, the Second Circuit had upheld the defendant's conviction for perjury based on the jury's finding that his nonresponsive answer was calculated to deceive. "For the purposes of 18 U.S.C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury."[32] That outcome is consistent with the context-sensitive interpretive approach courts adopt in tort cases.[33] The Supreme Court, however, reversed. In reviewing the exchange, the Court allowed that "in casual conversation [the

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31. Bronston v. United States, 409 U.S. 352, 354 (1973).
32. United States v. Bronston, 453 F.2d 555, 559 (2d Cir. 1971), *rev'd*, 409 U.S. 352 (1973).
33. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 529 (AM. LAW INST. 1979) ("A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.").

interpretation that the defendant had no personal account] might reasonably be drawn."[34] But despite the natural understanding of the defendant's answer, its tendency to mislead, and a jury finding of intent to deceive, the Court held that its literal truth was a complete defense.

> [T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.[35]

Federal perjury prosecutions turn on the literal meaning of the defendant's words, largely excluding contextually determined implied meanings.

Although the interpretive rules that attach to the federal perjury statute and to the tort of deceit differ from one another, both look to the nonlegal meaning of what the defendant said—whether it is the meaning that can be found in a dictionary (perjury) or in the full context of the statement (deceit). A few laws of deception apply default legal representations, either instead of or in addition to their other meanings. A legal default is a meaning that attaches to an act not by virtue of everyday understandings or conventional meanings, but by virtue of a legal rule.

The tort of promissory fraud, for example, rests on the rule that "a promise necessarily carries with it the implied assertion of an intention to perform."[36] Although based on conversational norms, this is a legal default. The law automatically imputes to

34. *Bronston*, 409 U.S. at 357.

35. *Id.* at 361.

36. RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (AM. LAW INST. 1979). *See also, e.g.*, Chedick v. Nash, 151 F.3d 1077, 1083 (D.C. Cir. 1998) ("It is equally plain that every party to a contract necessarily represents that it intends to perform all its obligations, whether implicit or explicit."); Old S. Life Ins. Co. v. Woodall, 326 So. 2d 726, 729 (Ala. 1976) ("When a promise is made the promisor expressly or by necessary implication states that he then has a present intention to perform."); Cicone v. URS Corp., 227 Cal. Rptr. 887, 892 (Cal. Ct. App. 1986) ("[A] promise to do something necessarily implies the intention to perform."); Berkeley Bank for Coops. v. Meibos, 607 P.2d 798, 804 (Utah 1980) ("The promise itself is regarded as a representation of a present intention to perform.") (quoting 1 FOWLER VINCENT HARPER & FLEMING JAMES, THE LAW OF TORTS 571–72 (1956)).

every contractual promise the representation of an intent to perform, unless the promisor says otherwise. Federal securities law provides another example. In its 2015 decision in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, the Supreme Court held that when an issuer makes a statement of belief in a registration statement, a reasonable investor "expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time."[37] The Court thereby attached to an issuer's statement of belief a default legal representation that the issuer has a reasonable basis for that belief.[38] A third example can be found in judicial applications of the federal False Claims Act (FCA). Under the implied certification doctrine adopted by several circuits, a government contractor's request for payment implicitly represents, as a matter of law, that the contractor is not in material breach.[39] Again, the law attaches a default implied representation.

In all these examples, the default corresponds to ordinary practices. We do not generally expect a person to promise without intending to perform, to have an opinion without a reasonable basis for it, or to ask for a contract payment without having performed. These legal rules, however, establish *noninterpretive* defaults. A fact finder does not need to interpret a promise to determine whether it represented an intent to perform. The law tells her it does. Interpretation comes in only if the defendant argues that the promise had a nondefault meaning.

These three types of rules—contextual conversational interpretation, literal meaning interpretation, and default representations—do not exhaust the ways laws of deception seek out meaning. In false advertising and securities cases, for example, courts have developed more complex interpretive regimes involving a mix of these and other approaches. But the

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37. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1329 (2015).

38. *See* Hillary A. Sale & Donald C. Langevoort, *"We Believe":* Omnicare, *Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 772 (2016).

39. *See, e.g.*, Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) (*overturned by* Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989 (2016)); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994). For a detailed account of the implied certification doctrine, see Michael Holt & Gregory Klass, *Implied Certification under the False Claims Act*, 41 PUB. CONT. L.J. 1 (2011).

simple examples are enough to show some of the variety among the interpretive rules one finds in laws of deception.

C. *Choosing an Interpretive Rule*

That variety suggests several interesting questions. Most obviously, why do laws of deception adopt the interpretative approaches they do? Or to turn it around, what does the interpretive approach of any given law of deception tell us about that law? The answer might involve any of at least three factors: the communicative environment, behavioral incentives, and the law's ability to affect how people speak.

First, the communicative environment is often salient. One might argue, for example (though the *Bronston* opinion did not), that the rules of ordinary conversation do not apply on the witness stand. Conversation presupposes a degree of cooperation that is often absent from testimonial exchanges. Thus in the examination of a hostile witness, it might be unreasonable to interpret a nonresponsive answer in light of the question asked, and better to focus on the answer's literal meaning. The ordinary rules of conversational implicature do not apply in this context.

Advertising is another example of a specialized communicative environment. Because advertisements do not involve a back-and-forth between the consumer and advertiser, they do not allow for clarifications, qualifications or follow-ups one finds in conversation. And though the relationship is not adversarial in the way the examination of a hostile witness can be, consumers are generally aware that advertisers seek to influence their buying choices—that advertisers are not their friends. These factors help explain why courts applying the Lanham Act's false advertising provisions sometimes eschew interpretation of anything but an advertisement's literal meaning, and why when there are allegations of implicit misrepresentation, courts often require empirical evidence of consumer deception.[40]

But the communicative environment is not the only explanation for choice of interpretive rules. A second factor is incentive effects.

The *Bronston* opinion, for example, emphasizes not the

40. *See* Klass, *supra* note 5, at 466–69, 488–94.

adversarial context of testimonial examination, but the possible deterrent effect of liability for implicit misrepresentations. "[O]ne consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: 'that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.'"[41] Better, the court reasoned, to protect against testimonial deception ex ante through a lawyer's assiduous examination at the time of the testimony than with ex post penalties for false implicit meanings.

The incentives created by defaults are especially interesting. A legal default representation can be used not only to capture what most speakers mean most of the time, but also to create new incentives for good behavior. The FCA's implied certification doctrine, for example, reinforces the maxim that "[m]en must turn square corners when they deal with the Government."[42] The FCA imposes treble damages and per se fines on contractors who misrepresent performance when they request payment from the government. The default representation of material compliance when seeking payment therefore gives contractors a new reason to ensure material compliance before requesting payment. The default addresses not only what contractors say, but also what they are expected to do.

Along the same lines, consider the practical effect of the *Omnicare* rule that a stock issuer's expression of belief in a registration statement implies a reasonable basis for that belief. Hilary Sales and Donald Langevoort have argued that the default incentivizes corporate directors to inquire into the existence and basis for such statements before signing off on a filing. The default thereby serves to reinforce and even extend directors' fiduciary obligations to shareholders.[43] Again, the default representation can affect underlying behavior by giving actors a new reason to ensure that it is true.

Third, legal interpretive rules can be designed to affect not only how people behave, but also how they speak and how they

41. Bronston v. United States, 409 U.S. 352, 359 (1973) (quoting Study of Perjury, *reprinted in* Report of New York Law Revision Commission, Legis. Doc. No. 60, p. 249 (1935)).

42. Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920).

43. Sale & Langevoort, *supra* note 38 at 790–95.

understand one another. The literal-truth rule for perjury does more than insulate witnesses against prosecution. It gives the examiner a new reason to avoid ambiguity and to ensure that she receives a clear answer to her question. The rule of interpretation thereby shifts regulation away from ex post punishment and toward ex ante observation and correction.[44]

How much a legal rule influences how people communicate depends on the circumstances. In the contexts of government contracting, the sale of securities, and questioning of witnesses under oath, participants are likely to be highly attuned to their words' legal effects. The tort of deceit, in distinction, covers contexts in which speakers and hearers are unlikely to be thinking about the relevant legal interpretive rule. We want and expect people in everyday commercial transactions to be able to rely on the ordinary, contextually determined meanings of their words. The tort of deceit therefore applies interpretive rules that mirror the interpretive rules hearers use, rather than trying to alter those rules.

* * *

Before leaving the topic, it is worth emphasizing that not all laws of deception require interpretation for their application. I have already mentioned disclosure obligations. When the buyer of a residential home claims that the seller failed to disclose termite damage, the preliminary question is not the meaning of what the seller said, but whether she said anything at all to put the buyer on notice of a termite problem. Nondisclosure is only one example of noninterpretive laws of deception. If the seller of a ship takes it out of dry dock and puts it in the water to hide its rotting hull, an action for concealment will turn not on the meaning of the ship owner's words or actions, but on the reason for floating the ship.[45] And even where words are used to deceive, a law might instruct decision makers to use noninterpretive tools to determine their effect. Thus, as noted above, the Lanham Act sometimes requires empirical studies of an ad's effects on consumer beliefs, rather than utilizing a fact finder's assessment of its

44. For a nuanced analysis of perjury that points in the same direction, see Allison Douglis, Note, *Disentangling Perjury and Lying*, 29 YALE J.L. & HUMAN. 339 (2017).

45. *See* Schneider v. Heath, 170 Eng. Rep. 1462, 1462–63 (Ct. Com. Pls. 1813); Klass, *supra* note 5 at 460–65.

best interpretation. Laws of deception not only employ various interpretive rules, but sometimes eschew or supplement interpretation.

III. DECEPTION AND AUTONOMY

I argued in Part I that laws of deception are justified in part by the fact that deception interferes with a hearer's autonomy. This Part discusses three clusters of issues, each of which touches in its own way on our political culture's commitment to individual autonomy: the harms that laws of deception address; when deception does and does not prevent legally effective consent; and parties' ability to contract out of a law of deception.

A. *The Harms of Deception and Speaker Autonomy*

Another way of dividing up laws of deception (in addition to categorizing them by interpretive rules) is according to the harm a law addresses. As a starting place, consider the difference between deceit and defamation. The tort of deceit is designed to protect the recipient or hearer of a false statement from acting on false information. The plaintiff is a hearer and must prove both reliance and resulting injury.[46] Defamation, in contrast, is designed to protect the subject of a falsehood. The plaintiff is not a hearer who was deceived, but the subject of the falsehood whose reputation was thereby harmed. The plaintiff must show not that she relied on the falsehood, but that others were likely to believe it to her detriment.[47]

Alternatively or in addition, a law of deception might be designed to protect honest market participants from the competitive harms caused by dishonesty. A competitor's deceptive business practices can harm honest businesses in two ways. The deceptive practices can draw customers away from those who do not engage in deception. And they can erode trust more generally, creating a market for lemons and driving down prices.[48] Thus in the United States the earliest pushes for laws

46. *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1979).

47. *See* 3 DAN B. DOBBS ET AL., THE LAW OF TORTS § 519 (2d ed. 2011).

48. When buyers cannot trust sellers' statements of quality, they assume all goods are of low quality, and so are willing to pay only the price for low-quality goods. In such a "market for lemons," it does not pay to sell high-quality goods.

against false advertising came not from consumers or consumer protection groups, but from the business community. As historian Edward Balleisan explains, national businesses "create[d] a series of nonprofit business organizations between the mid-1890s and early 1920s, all primarily dedicated to rooting out fraud in the American marketplace."[49] These organizations both engaged in private campaigns against false advertising and partnered with government enforcers. That history partly explains why contemporary false advertising law so heavily relies on competitor suits under the Lanham Act.

Finally, a law of deception might not take aim at concrete harms, but instead seek to underwrite credible communication in one or another forum more generally, or to punish specific types of lies. Consider 18 U.S.C. § 1001, which criminalizes knowingly and willfully "mak[ing] any materially false, fictitious, or fraudulent statement or representation" to a government official.[50] The statute does not require that the government official believe or act upon the false statement.[51] Suppose, for example, a criminal investigator asks a suspect about a crime that the investigator knows the suspect committed, and the suspect predictably denies having committed it. Lisa Kern Griffin has compared such exculpatory lies to puffery—a falsehood that no one would believe or rely on. "The natural reaction of most subjects confronted by investigators is to respond in a way that deflects scrutiny and forestalls liability—a reaction that agents generally anticipate."[52] Yet the lie can be prosecuted under section 1001. The absence of a reliance requirement suggests that the law seeks not to prevent the harms of deception, but to enforce a more general duty of truthfulness when dealing with government officials. "Although on its face the statute protects the accuracy of the information that individuals convey to the government, the desire for efficiency, the assertion of authority, and a preoccupation with apology better explain charging

49. BALLEISEN, *supra* note 6, at 179.

50. 18 U.S.C. § 1001(a)(2) (2017).

51. Thus in *Brogan v. United States*, the Supreme Court declined to limit the crime to "falsehoods that pervert governmental functions." 522 U.S. 398, 402 (1998).

52. Lisa Kern Griffith, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1520 (2009).

decisions."[53]

Together these examples indicate at least four broad functions laws of deception might serve. A law of deception might be designed to protect those who might be deceived; to protect those about whom a deceptive statement is made; to prevent honest market participants from unfair competition by dishonest ones; and to promote honesty or punish dishonesty in specific communicative contexts, whether or not the deception results in concrete harms. These purposes are not mutually exclusive. Contemporary false advertising and trademark laws, for example, aim both to protect consumers from being deceived and to protect honest business from unfair competition. And criminal fraud laws might aim both to prevent harms to victims and to exact retribution on wrongdoers.

It is sometimes uncertain just what type of harm a law of deception is meant to address. The law governing private 10b-5 actions for securities fraud is an example.[54] On some accounts, the cause of action is designed to compensate the victims of securities fraud—those who, in reliance on the deceptive acts, bought high or sold low. Thus the 10b-5 plaintiff must show *inter alia* reliance, causation and materiality.[55] On other accounts, the purpose of the 10b-5 action is not to compensate the plaintiffs, but to police the integrity of the market as a whole. On this model, plaintiffs function as private attorneys general, deterring companies from engaging in securities fraud. The award is not so much to compensate the plaintiff for her loss as to reward her, and her attorney, for bringing the enforcement action, and to incentivize others to do the same.[56]

The difference between these accounts is important when it comes to thinking about the rules for class actions. Not every buyer or seller of stocks will have encountered or relied on the act or omission at issue in a securities fraud case. This can

53. *Id.* at 1533.

54. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755 (2013).

55. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976).

56. Goldberg and Zipursky argue that neither of these accounts succeeds, and propose a third. According to them, private 10b-5 actions that employ the fraud-on-the-market presumption aim to compensate plaintiffs for non-reliance-based harms that misrepresentations cause. The cause of action is therefore fundamentally different from the tort of deceit, and better understood by comparison to the torts of negligence causing loss and tortious interference with prospective advantage. Goldberg & Zipursky, *supra* note 54, at 1799–1803.

make it difficult to satisfy the commonality requirement for a class action.[57] The Supreme Court addressed this worry in 1988 in *Basic v. Levinson* by establishing a presumption that market participants buy or sell stock not in reliance on particular representations, but on the assumption that its price is not generally distorted by prohibited misrepresentations or omissions.[58] That presumption provides to the class shared forms of reliance and causation.

Basic's theory of fraud on the market has, in years since, generated a host of further questions.[59] Most importantly: How and when do issuer misstatements or nondisclosures affect stock prices? And do investors really assume that they have perfect information when they buy and sell? As Don Langevoort has observed: "Fraud and manipulation are predictable enough that it would be foolish for anyone simply to *assume* that a stock price has integrity. In an efficient market, the inevitable risk of fraud is priced and investors are compensated for taking on the risk—the market is not assuming its absence."[60]

If the empirical basis for the fraud-on-the-market presumption is shaky, whether or not to keep it depends on the purpose of the 10b-5 action—whether it is meant to compensate investors for actual losses, or to incentivize private attorneys general to help ensure the integrity of the informational market. On the former model, questions about the price effects of disinformation and how market participants make buy and sell decisions are essential. If it turns out such questions are difficult to answer for any tractable class of plaintiffs, so much the worse for class actions. On the latter model, the design question shifts to the optimal level of enforcement. If the goal is to reward enterprising lawyers who act as private attorneys general, the question is not whether *Basic*'s fraud-on-the-market presumption is true, but whether it provides the right reward structure.

The above discussion required going fairly deep into the securities-fraud weeds, but the point is a simple one: form should follow function. The proper design of any law of

57. FED. R. CIV. P. 23(a)(2).

58. Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988).

59. *See generally* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151.

60. *Id.* at 160 (footnote omitted).

deception depends on the type of harm or harms the law is meant to address.

Harm is also relevant to constitutional issues, adding another dimension to the relation between laws of deception and individual autonomy. In *United States v. Alvarez*,[61] the Supreme Court considered the constitutionality of the Stolen Valor Act of 2005, which criminalized falsely claiming to have received a military decoration.[62] In 2007, Xavier Alvarez falsely stated at a local water board meeting that he was a retired Marine and had been awarded the Congressional Medal of Honor.[63] These statements were not made for the purpose of securing a material benefit and apparently harmed no one—if they were even believed. But because the lie concerned the Congressional Medal of Honor, Alvarez was prosecuted under the Stolen Valor Act, which provided for a punishment of up to a year in prison.

The Supreme Court held that Alvarez's prosecution, and the Stolen Valor Act as a whole, violated the First Amendment. Although the decision was not unanimous, each of the three opinions focused on the question of harm. Justice Kennedy, writing for the plurality, emphasized that the Court's prior statements that falsehoods receive no First Amendment protection had all occurred in "cases discussing defamation, fraud, or some other legally cognizable harm associated with false statements."[64] Justice Breyer, in concurrence, similarly observed that when a statute prohibiting falsehoods escapes First Amendment scrutiny, it is because "requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur."[65] Accordingly, both

61. 567 U.S. 709 (2012) (plurality opinion).

62. Stolen Valor Act of 2005, 18 U.S.C. § 704 (2012), *invalidated by* United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion).

63. *Alvarez*, 567 U.S. at 713–14.

64. *Id.* at 718.

65. *Id.* at 736 (Breyer, J., concurring).

> [M]any statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.

Id. at 734.

Kennedy and Breyer suggested that the Act might have complied with the First Amendment if it had required "a showing that the false statement caused specific harm or at least was material, or focus[ed] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm."[66] Justice Alito, writing in dissent, did not dispute the major premise of the Kennedy and Breyer opinions—that constitutionality turned on harm. Instead Alito argued that lies about military honors in fact "inflict substantial harm," sometimes tangible, as when they are used to secure material benefits, and more generally by debasing the award and undermining the credibility of truthful claims.[67] In short, all three opinions in *Alvarez* agreed that prohibiting harmless lies violates the First Amendment.

I observed at the end of Part I that in our political culture laws prohibiting deceptive manipulation are easier to justify than laws prohibiting nondeceptive manipulation because of the way deception interferes with hearer autonomy. *Alvarez* illustrates another boundary line: we are more comfortable prohibiting harmful deception than we are prohibiting harmless lies. That line corresponds to John Stuart Mill's harm principle: "[T]he 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."[68] The harm principle, in turn, is founded on a liberal commitment to personal autonomy, here speaker autonomy. Autonomy therefore figures into both the justification for laws of deception and the limits we put on those laws. Laws of deception are justified, at least in part, because deception undermines hearer autonomy. At the same time, our commitment to speaker autonomy leads us to generally limit those laws to cases of harmful deception, as distinguished from harmless lies.

As the opinions in *Alvarez* illustrate, the line between harmful and harmless deception is not a bright one. And the

66. *Id.* at 738; *see also id.* at 723 (plurality opinion) ("Where false claims are made to effect a fraud, or secure moneys or other valuable consideration, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.").

67. *Id.* at 742–43 (Alito, J., dissenting).

68. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). Mill himself, of course, deployed the harm principle in his defense of freedom of speech.

judicial application of section 1001 suggests that sometimes we are comfortable punishing the harmless lie. The point is not that a commitment to speaker autonomy provides a fixed limit on laws of deception, but that it is an important consideration when evaluating them.

B. *Deception and Consent*

The relationship between the law of deception and autonomy can also be seen in the effect of deception on what would otherwise be legally effective consent.

It is commonly said that fraud vitiates consent,[69] or in another formulation: "[C]onsent obtained on the basis of deception is no consent at all."[70] Such statements are often found in torts cases. For example, if *B* permits *A* to enter *B*'s home because *A* has misrepresented that she is a meter reader, *A* has committed trespass, even though *B* has apparently consented to the entry.[71] If *A* induces *B* to agree to a touching by falsely representing that *A* is a physician, *A* has committed battery, despite *B*'s apparent consent to the touching.[72] Analogous rules can be found in contract law, Fourth Amendment jurisprudence, and rape law.

It is something of an open question how best to explain the rule that fraud vitiates consent. One could begin with the principle that no one shall benefit from her own wrong—*nullus commodum capere potest de injuria sua propria.*[73] The wrong in these cases is the defendant's deceptive conduct. The rule that fraud vitiates consent prevents the defendant from benefitting from that wrong. That result comports with our moral sense. And it disincentivizes engaging in the deception in the first place.

There is, however, an alternative explanation. The rule in tort does not require misrepresentation by the defendant. It is enough, according to the Second Restatement of Torts, that "the person consenting to the conduct of another is induced to consent by a substantial mistake . . . and the mistake is known

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69. *See, e.g.*, Slawek v. Stroh, 215 N.W.2d 9, 20 (Wis. 1974).

70. McClellan v. Allstate Ins. Co., 247 A.2d 58, 61 (D.C. 1968).

71. State v. Donahue, 762 P.2d 1022, 1025 (Or. Ct. App. 1988).

72. *See, e.g.*, Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 333 (3d Cir. 1957).

73. Famously applied in Neiman v. Hurff, 993 A.2d 345, 347 (N.J. 1952).

to the other."[74] The mistake prong suggests another explanation: the rule that fraud vitiates consent is not so much about the wrong of deception as it is about the quality of the consent. When apparent consent to an invasive act is based on a substantial mistake, it is not truly voluntary and therefore not actual consent. If the invader is unaware of the mistake, the appearance of consent provides something like a defense to the tort. That defense is not available, however, if the invader knows of the mistake. On this account, fraud vitiates consent not because the fraud is a wrong, but because one who fraudulently induces apparent consent knows that the consent is defective.

Either account suffices to explain the rule. A third draws the two explanations together to provide an even stronger case for it, and returns us to an idea from Part I. When *A* obtains *B*'s consent through deception, it is not just that *B*'s consent is defective and *A* knows it. *A* has intentionally and surreptitiously caused *B*'s apparent consent. *B* has, in this respect, fallen under *A*'s control. *B*'s decision is not autonomous (self-governed) but heteronomous (governed by another). Consent obtained through deception is even less autonomous than consent based on other sorts of mistake. The consenting party is under the sway of the deceiver.

It is not obvious that we need to decide between these three accounts of the rule that fraud vitiates consent. They may complement rather than compete with one another. There is, however, a more pressing practical problem: defining the rule's proper limits.

Richard Posner, writing for the court in *Desnick v. American Broadcasting Company*, has explained why the rule cannot possibly apply to all deceptive behavior. Without exceptions to it,

> a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the

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74. RESTATEMENT (SECOND) TORTS § 892B(2) (AM. LAW INST. 1979).

same car elsewhere at a lower price would be a trespasser in the dealer's showroom.[75]

In all these cases the deception induces the consent. Had the consenting person known the truth, she would not have consented to the deceiver's presence. Yet we hesitate to identify them as instances of trespass—at least in the sense that they warrant legal intervention.

The above examples might be dismissed as involving *de minimis* forms of deception. But courts have found exceptions to the rule even when the deception is more substantial. Two circuits have held that journalists do not commit trespass when they misrepresent who they are in order to gain access to a business.[76] In the Fourth Amendment context, a drug suspect's consent to a warrantless entry is effective even if induced by a police officer's false claim that he is a customer seeking to purchase drugs,[77] though if an officer misrepresents that he has a warrant the consent is not effective.[78] And in most U.S. jurisdictions, the criminal law recognizes only two types of deception that negates consent to sex: a false representation that the sexual act is a medical procedure and impersonation of a spouse.[79] Thus a man who misrepresents himself to be his twin brother to obtain his brother's girlfriend's consent to sexual intercourse might not commit sexual misconduct, even though the consent was clearly defective.[80]

It is not obvious that there is a single line running through all these different rules. The exceptions to the rule that fraud vitiates consent are narrower in the Fourth Amendment and criminal law contexts than they are in tort law. And though deception can serve as a defense to contract[81]—fraud vitiates the deceived party's agreement to the exchange—it is not obvious that there are any exceptions to the defense analogous to the exceptions in tort, Fourth Amendment law, or criminal law.

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75. Desnick v. Am. Broad. Co., 44 F.3d 1345, 1351 (7th Cir. 1995).

76. *Id.* at 1353; Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 518 (4th Cir. 1999).

77. Lewis v. United States, 385 U.S. 206 (1966).

78. Bumper v. North Carolina, 391 U.S. 543 (1968).

79. *See* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1397 (2013).

80. People v. Hough, 607 N.Y.S.2d 884 (N.Y. Dist. Ct. 1994).

81. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981).

With respect to trespass, Posner suggests that fraud vitiates consent only when the invasion infringes on interests that the law is designed to protect. *Desnick v. American Broadcasting* considered a news organization's use of test patients with concealed cameras to investigate whether an ophthalmic clinic was performing unnecessary procedures. Posner explained that there was no trespass because "there was no invasion . . . of any of the specific interests that the tort of trespass seeks to protect."[82] The test patients did not disrupt the clinic's activities; there was no invasion of privacy; there was no eavesdropping or publicity of private facts; there was no theft of trade secrets or disruption of the peace. In short, "the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land."[83] Consequently, the test patients' fraud did not vitiate the clinic's consent to their entry.

There are problems with the line Posner suggests. For one thing, it presumes that courts can identify the types of interests that the law of trespass protects. Thinking about the question in the abstract, one might include on the list a property owner's power to exclude from the property whomever she wishes. But such a list would be incompatible with the *Desnick* holding. The test patients' deception denied the clinic the knowledge it needed to exercise its power to exclude. One might also wonder whether Posner's analysis proves too much. If there is no invasion of interests that the law of trespass protects, perhaps consent—defective or not—should not make a difference. We should get the same result if the test patients had simply snuck into the clinic to film it.

Finally, it is difficult to ignore that the *Desnick* defendant was a news organization trying to expose an eye clinic that was performing unnecessary surgeries. Most of Posner's examples of non-vitiating deception involve socially accepted and even beneficial misrepresentations—a restaurant critic's disguise, antidiscrimination testers' misrepresented purpose, undercover reporting. Perhaps some of these cases turn as much on the social value of the deception as on the nature of the infringement. Where the deception is not a wrong, the law

82. Desnick v. Am. Broad. Co., 44 F.3d 1345, 1352 (7th Cir. 1995).
83. *Id.* at 1353.

permits the deceiver to benefit from it. Or to put the point in the terms from above: the wrongdoing hearer in these cases does not have an autonomy interest that the law protects. The law in effect authorizes some forms of private deceptive manipulation.[84]

A recent District Court decision further illustrates the competing interests in these cases. *Animal Legal Defense Fund v. Herbert*[85] (hereinafter "*ALDF*") addressed the constitutionality of Utah's ag-gag law, whose section 2(b) criminalized "obtain[ing] access to an agricultural operation under false pretenses."[86] The ag-gag law was designed to prevent undercover investigations, by the press and by animal rights advocates, of agricultural operations. The plaintiffs—animal rights organizations and an individual who had been wrongly charged under the law—argued that it violated the First Amendment.

ALDF is interesting in the context of this Essay because the court's analysis of section 2(b) appears to pit the speaker's autonomy interests against the hearer's. The District Court began its analysis with *Alvarez*, reading the Supreme Court's decision to entail that "if any of the lies prohibited by the Act do not cause legally cognizable harm, those lies are protected under the First Amendment and the lying provision of the Act criminalizing them is subject to scrutiny."[87] Among the possible harms that an investigator's lies might cause is trespass: the investigator has gained access to the agricultural operation by misrepresenting who she is or what she intends to do when there. The District Court then based its analysis of the potential harm on Posner's *Desnick* analysis: "[I]f the liar does not interfere with ownership or possession of the land, [the landowner's] consent to access the property remains valid, notwithstanding that it was obtained nefariously through misrepresentation."[88] Because section 2(b) was written so as to criminalize merely gaining access to the property, the court

84. Ian Ayres and I have made a similar point about why a lying promise to commit a crime should not be punished. *See* AYRES & KLASS, *supra* note 27, at 158–61.

85. No. 2:13-cv-00679-RJS, 2017 WL 2912423 (D. Utah, July 7, 2017).

86. Agricultural Operation Interference, Utah Code § 76-6-112(2)(b) (2017), *invalidated by Herbert*, 2017 WL 2912423, at *15.

87. *Herbert*, 2017 WL 2912423, at *6.

88. *Id.* at *7 (footnote omitted).

concluded that it criminalized harmless lies—lies that, according to *Alvarez*, receive First Amendment protection.[89] From there it was a short step to concluding that the law was a form of content-based regulation, subjecting it to strict scrutiny, which the provision failed to pass.[90]

There is a lot going on in *ALDF*. Here I make only three observations. First, because of *ALDF*'s procedural posture—the plaintiffs were animal rights activists bringing a facial challenge to the law—it was enough to find a possible application that would violate the First Amendment. As the court observed, the case "might seem to involve a weighing of the value of undercover investigations against the wisdom and reasoning behind laws suppressing them."[91] But "because of both the breadth of the Act and the narrow grounds on which the State defended it," those issues were never fully litigated.[92] Second, this leaves open the question of whether a more narrowly tailored law—one, say, that criminalized not merely entering the land, but engaging in activities that the owner clearly objected to—would violate the First Amendment. Such a law would strain the boundaries of Posner's approach. Whereas a common law court can invoke its own judgment as to what interests trespass does or does not protect, a narrowly drawn statute would answer the question for the court. Third, all this suggests that the First Amendment does not get at what is really worrisome about these laws. The real question is whether, where there is evidence that an agricultural producer is engaging in animal cruelty, the law should recognize its autonomy interest in being free from a deceptive intrusion. This, of course, is a policy question—one that the First Amendment might not answer.

C. *Consent to Deception*

One might also ask whether parties should be able to contract out of laws of deception—to legally consent to being deceived. For any given law of deception, we can ask whether it should be a default or a mandatory rule—whether parties

89. *Id.* at *9.
90. *Id.* at *12–13, *14–15.
91. *Id.* at *14.
92. *Id.*

should or should not be able to opt out of it. A commitment to freedom of contract generally means enforcing the terms parties choose. If, absent prior agreement, deception threatens hearer autonomy, the power to contract out of a law of deception would seem to expand party autonomy.

Just when parties should be able to contract out of a law of deception depends on at least three factors: the law's purpose, how wrongful the deceptive behavior is, and the availability of effective mechanisms of consent.

The first factor is the law's purpose, and especially the types of harms it is designed to address. It would be odd, for example, to allow participants in a judicial proceeding to contract out of the law of perjury. Perjury exists not to serve the individuals in a courtroom, but society's interests in the integrity of judicial proceedings and accurate adjudicative outcomes. Giving participants the ability to contract out of liability for false testimony would not advance those purposes, but undermine them.

The ability to opt out seems less problematic with respect to other laws of deception. Consider a multimillion-dollar corporate acquisition, in which the written agreement includes a list of carefully negotiated, legally binding representations. The parties to such a transaction, or their lawyers, might reasonably worry that statements made during the solicitation or negotiations might create a risk of tort liability or contractual defenses, thereby introducing uncertainty into a transaction and occasions for opportunism or judicial error. Here it appears more reasonable to empower the parties to limit their liability for at least some potentially deceptive acts. If the purpose of the rules is to protect the parties, why not allow sophisticated parties to agree to forgo their protections?

But would we want such parties to be able to contract out of legal liability for *any* deceptive act? A second relevant factor is the nature of the deceptive act or omission. We might want, for example, to permit sophisticated parties to contract out of liability for negligent misrepresentations, but not for intentional ones. Such a rule would accord with the Second Restatement of Contracts, which states that parties can contract out of liability for negligence and adopt reasonable terms "exempting a party from the legal consequences of a

misrepresentation,"[93] but suggests that any "term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable."[94] Thus, to return to the above example, we might want to empower parties to a corporate acquisition to limit liability for negligent misrepresentations made during the solicitation and negotiation periods, but not for intentional misrepresentations. Similarly, we might want to empower principals to contract out of tort liability for misrepresentations by their agents, including liability for fraudulent misrepresentations, but not for their own lies.[95]

A third factor is whether there exists a reliable mechanism for determining when a party has agreed to no liability for deception.[96] Consider, for example, false advertising law. Assuming *arguendo* that we wanted to allow consumers to opt out of its protections, perhaps in exchange for a lower price, it is not obvious how the opt-out would work. Would it be enough for an advertiser to print or say somewhere in the advertisement, "No legal guarantee of truthfulness"? Would all consumers pay attention to such legal language? Would all consumers understand it the same way?

Texas's Deceptive Trade Practices and Consumer Protection Act provides a nice example for thinking about the design problem. The Act provides that a consumer has the power to waive its protections, but only if "(1) the waiver is in writing and is signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services."[97] The law further provides

93. *See* RESTATEMENT (SECOND) OF CONTRACTS § 196 (AM. LAW INST. 1981).

94. *Id.* § 195(1).

95. *See* RESTATEMENT (SECOND) OF AGENCY § 260 (AM. LAW INST. 1958). *But see* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. c(4) (AM. LAW INST. 2006) (suggesting that such an exculpatory clause for an agent's fraudulent misrepresentations is not effective when the principal knows or has reason to know that the agent is likely to misrepresent, but that notification that the agent does not have authority to bind the principal through certain representations could be).

96. In the parlance of contract theory, every default comes with an altering rule. An altering rule specifies who must say what and in what manner to realize a nondefault legal state of affairs. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012). If parties can contract out of a law of deception, that law is a mere default. The question, then, is what the altering rule should be.

97. TEX. BUS. & COM. CODE ANN. § 17.42(a) (West 2017).

that the consumer's counsel must be independent of the business and that the waiver must be

> (1) conspicuous and in bold-face type of at least 10 points in size; (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and (3) in substantially the following form: "I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."[98]

The reasons for all these requirements are fairly obvious: to ensure that the consumer's waiver is informed and fully voluntary. So too are their costs in time, effort and attorney's fees. One might guess that few if any consumers are likely to exercise their power to opt out of the Act's protections. In practice, the Texas Deceptive Trade Practices and Consumer Protection Act is probably an all but mandatory rule.

Effective and accurate mechanisms of consent are easier to imagine in bespoke transactions between legally sophisticated parties. Thus the Delaware Chancery Court has held that a simple exculpatory clause in a stock purchase agreement insulated the seller against any negligent misrepresentations.[99] And sophisticated parties in securities markets regularly issue "big boy" letters to insulate themselves from liability for nondisclosure.[100] The power to opt out of a law of deception requires an effective way to knowingly exercise that power. Whether to allow parties to legally consent to being deceived depends both on principle and on practicality.

* * *

Although this Part has emphasized the different ways that a commitment to individual autonomy figures into the law of deception, I do not want to make too much of the point. Laws of deception are about more than autonomy. They also serve *inter*

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98. *Id.* § 17.42(b)–(c).

99. ABRY Partners V, L.P. v. F&W Acquisitions LLC, 891 A.2d 1032, 1035 (Del. Ch. 2006).

100. *See* Edwin D. Eshmoili, Note, *Big Boy Letters: Trading on Inside Information*, 94 CORNELL L. REV. 133, 135 (2008).

alia to prevent financial and other harms, to establish and enforce morals of the marketplace, to compensate for wrongful losses, to punish wrongdoers, and to increase overall welfare. But our political culture's commitment to autonomy figures into the outlines of the law of deception in distinctive and important ways.

CONCLUSION

The above tour through a few regions of the law of deception suggests something of its common geography. And I hope it has convinced the reader of the advantage of thinking about the category as a whole. Although my goal has not been to advance any big theses about the law of deception, two broad areas of inquiry have emerged. The first concerns rules of interpretation. Although much work has been done on the interpretation of legal texts, very little has been done on how interpretation works within laws of deception. There is room for additional research in this area. The second is the complex relationship between laws of deception and individual autonomy. Because deception interferes with hearer autonomy, we are more comfortable regulating it than we are other forms of manipulation, and deception sometimes vitiates what would otherwise be legally effective consent. At the same time, a commitment to speaker autonomy limits the regulation of harmless lies. Finally, a commitment to autonomy suggests that parties should sometimes be able to opt out of protections that the law of deception otherwise provides.

The above discussion does not cover all the questions one might ask about the law of deception. I have not systematically discussed materiality rules, knowledge and intent requirements, disclosure requirements or remedies. Nor have I addressed special procedural rules that attach to laws of deception, such as Rule 9(b)'s heightened pleading or anti-SLAPP laws. Also important are broader design questions, such as whether the law should rely on ex ante oversight or ex post punishment, or the relationship between legal and nonlegal norms. I hope it is enough to convince, however, the value to legal theorists of thinking about the law of deception as a whole. Thinking across the traditional doctrinal lines both suggests new answers to existing questions we might have about laws of deception and suggests new ones.

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